SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-1192

JOSEPH P. PFINGST,

Petitioner,

—v.—

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

PAGE

Citation to Opinions Below 1

Jurisdiction 2

The Question Presented 2

Constitutional Provisions and Statutes Involved 3

Statement of the Case 3

A. The Facts 4

1. The Promises 4

2. Defense Requests for Disclosure of the Promises 6

3. The Supression of the Promises and the Perjury in Relation thereto 7

B. The Importance of the Promises in the Trial Context 9

Reasons for Granting the Writ 12

Conclusion 19

Appendix A: Opinion of the Court of Appeals A1

Appendix B: Opinion of the District Court B1

Appendix C: Constitutional Provisions, Statute and Rule involved C1

TABLE OF AUTHORITIES

Cases:

	PAGE
Brady v.*Maryland*, 373 U.S. 83 (1963)	2, 12
Giglio v.*United States*, 405 U.S. 150 (1972)	2, 12
Giles v. *Maryland*, 386 U.S. 66 (1967)	12
Hall v. *United States*, 352 F. Supp. 1144 (1973)	12
Mooney v. *Holohan*, 294 U.S. 103 (1935)	12,
Napue v. *State of Illinois*, 360 U.S. 264 (1959)	2, 12
Simos v. *Gray*, 356 F. Supp. 265 (1973)	12
Spriggs v. *Wilson*, 419 F.2d 759 (C.A.D.C. 1969)	15
United States v. *Johnson*, 327 U.S. 106 (1946)	18
United States v. *Kahn*, 472 F.2d 272 (2d Cir. 1972)	12, 17
United States v. *Kaplan*, 470 F.2d 100 (7th Cir. 1972)	12, 13, 17
United States v. *Keogh*, 391 F.2d 138 (2d Cir. 1968)	12
United States v. *Miller*, 411 F.2d 825 (2d Cir. 1969)	13

United States v. *Pfingst*, 477 F.2d 177 (2d Cir. 1972) Cert. denied 412 U.S. 941 ..... 3, 9

United States v. *Polisi*, 416 F.2d 573 (2d Cir. 1969) 12

United States v. *Tomaiolo*, 378 F.2d 26 (2d Cir. 1967) 12

Zovluck v. *United States* 448 F.2d 339 (2d Cir. 1971) 18

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Petitioner, Joseph P. Pfingst, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on December 17, 1973 in the proceeding entitled *United States of America, Appellee,* vs. *Joseph P. Pfingst, Appellant,* Docket No. 73-2345.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported but the slip opinion is printed in Appendix A attached hereto. The opinion of the district court was not officially reported and is printed in Appendix B attached hereto.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered on December 17, 1973. By order of Mr. Justice Marshall, dated January 8, 1974, the time for filing a petition for writ of certiorari was extended to February 6, 1974. The jurisdiction of this Court is invoked under Title 28, U.S.C. Sec. 1254(1).

QUESTION PRESENTED

This petition presents the question of the degree of prejudice required for a new trial under *Brady**, where the defense discovers after conviction that promises of leniency had been made to the Government's principal witness; that the prosecutor was aware of the promises; and that he failed to reveal them after the defense had made specific pre-trial written and oral requests for their disclosure.

The petition also raises the question of the degree of prejudice required for a new trial under *Napue** and *Giglio**, where the prosecutor fails to correct false testimony of his chief witness denying that such a promise had been made.

The Court of Appeals found the foregoing facts. It nevertheless affirmed the district court's denial of defendant's motion for a new trial based on newly discovered evidence (the promises of leniency). Its decision was based on the finding that the prosecutor's failure to reveal the promises was non-deliberate, as was his failure to correct the false testimony, and that petitioner did not meet the standard of prejudice required for a new trial in cases of inadvertent non-disclosure by the prosecutor.

This petition therefore raises the question of the dimensions of the materiality requirement under the due process principles set forth in *Brady*, *Napue* and *Giglio*. It is a question of first impression in this Court.

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* *Brady v. Maryland, 373 U.S. 83 (1963)*
Napue v. State if Illinois, 360 U.S. 264 (1959)
Giglio v. United States, 405 U.S. 150 (1972)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the due process clause of the fifth amendment and the right to counsel clause of the sixth amendment to the United States Constitution. The motion for a new trial was based on Rule 33 of the Federal Rules of Criminal Procedure. The district court also treated the application as one under 28 U.S.C. 2255. These provisions are printed in Appendix C attached hereto.

STATEMENT OF THE CASE

Petitioner, then a New York State Supreme Court Justice,* was convicted in the United States District Court for the Eastern District of New York on three counts in a ten count indictment, of having (while a practicing attorney, some three years before his election to the bench) violated 18 U.S.C., 152 and 2, by participating in a transfer of corporate assets in contemplation of bankruptcy. He was sentenced to three years imprisonment, all of which was suspended except four months thereof. The judgment of conviction was affirmed by the Court of Appeals, 477 F.2d 177,** and this Court denied certiorari, 412 U.S. 941 (1973).

Thereafter, petitioner moved for a new trial on the ground of newly discovered evidence of promises of leniency to the Government's chief witness which had been suppressed by the prosecutor. The district court, after an evidentiary hearing, denied the motion for a new trial. The Court of Appeals affirmed. Execution of the sentence has been stayed pending appeal.

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* Petitioner no longer holds that office. His removal under State law was required by the fact of conviction in this case.

** Reference to this opinion will hereafter be designated (Pfingst I, p.).

A. THE FACTS

I. The Promises

In April, 1966, Ramon N. D'Onofrio was president and principal stockholder of Evans Amityville Dairy, Inc. and several related corporations. Petitioner was their attorney. Involuntary petitions in backruptcy were filed against two of the corporations, which were subsequently adjudicated bankrupts. A federal investigation of D'Onofrio ensued which resulted in the convening of a grand jury in June, 1970 (A 3-4). By this time petitioner had been elected a supreme court justice and had been serving as such since January 1, 1969.

On September 3, 1970, while the grand jury investigation was in progress D'Onofrio requested a meeting with Anthony Lombardino, Chief of the Criminal Division in the U.S. Attorney's office to discuss the matter (A4). He offered to cooperate by inculpating petitioner in exchange for immunity. Lombardino refused the immunity request but suggested that D'Onofrio would have to plead guilty to "something in the indictment" and his cooperation would be made known to the sentencing judge (*id.*) Lombardino testified that nothing was settled at that meeting but that D'Onofrio said "he wanted to leave and think about it, consult with counsel." (Tr. 627).*

On the following day, September 4, D'Onofrio returned to Lombardino's office accompanied by his attorney, Stephen Duke. Duke's uncontradicted testimony about that meeting forms the basis for the Court of Appeals abbreviated description thereof (A5).

Duke testified at page 200 *et seq.* of the transcript that:

(1) He asked for certain assurances on behalf of D'Onofrio "for becoming a cooperative government witness":

* With the Court's permission, in lieu of an appendix below petitioner filed copies of the transcript of the evidentiary hearing and a volume of exhibits. References to the transcript will be designated Tr. and those to the exhibit volume will be designated E.

(2) "I initially, as I said, asked for immunity" which was refused;

(3) "I said alternatively I wanted assurances that he wouldn't be prosecuted for any prior perjury or income tax evasion";

(4) Lombardino said "He thought perhaps he could -- *if Mr. D'Onofrio decided to cooperate* he could give assurances that if he pled guilty to one count of the bankruptcy fraud he couldn't be prosecuted for income tax evasion or perjury." (emphasis added)

(5) At the close of the meeting, both the perjury issue and the income tax evasion were unresolved. Duke then testified (Tr. 277-278):

> "Well, the question of whether Mr. D'Onofrio was going to cooperate was unresolved too, of course."

After the meeting Lombardino received approval from the United States Attorney for the giving of the assurances which D'Onofrio wanted (A5). A few days later he telephoned Duke and gave the assurances (*id.*) Duke testified (Tr. 279) that upon receiving these assurances he said "Okay, he's -- he's going to cooperate."

D'Onofrio testified against petitioner before the grand jury which returned an indictment on February 8, 1971. Petitioner was thereafter convicted on three counts of the ten count indictment. His conviction on each of these three counts depended largely upon D'Onofrio's testimony. The Court below referred to some "corroboration" (A12) which "buttressed" (A32) D'Onofrio's testimony on these counts. This corroboration is not substantial. In Pfingst I, the Court of Appeals said (p. 183)

> "It is to be noted that on *all* charges D'Onofrio's testimony was a considerable portion of the prosecution's case against Pfingst." (emphasis supplied)

Elsewhere in that opinion (p. 191) the Court described D'Onofrio's credibility as "the critical issue" on the three counts on which petitioner was convicted. The Government has admitted (E7) that without D'Onofrio's testimony the case could not be successfully prosecuted.

2. Defense Requests for Disclosure of the Promises

On February 11, 1971, shortly after the indictment, defense counsel wrote to the U.S. Attorney at the latter's suggestion seeking to expedite pretrial discovery. The letter requested various materials including: (A6)

> "7. A brief statement indicating if any promises or assurances were made to defendant D'Onofrio which could reasonably give hope to defendant D'Onofrio for lenient treatment as a result of his testimony."

The prosecutor furnished various materials in response to that letter but no information was received in response to item 7 (A6, 8).

Thereafter, by formal discovery motion the defense requested the Government to furnish all information or material in its possession exculpatory or favorable to Pfingst. The Government by an affidavit of the prosecutor denied having any such information. The affidavit went on to say:

> "Of course, the Government is aware of its continuing duty to disclose such information if it should become apparent during the course of the proceeding."

Prior to trial, D'Onofrio pleaded guilty to one count in the indictment. Defense counsel was present at the plea. The prosecutor represented to the Court that D'Onofrio had been informed that the government would move to dismiss the remaining counts against him, that his cooperation would be brought to the attention of the sentencing judge, *and that there were no other promises* (A8).

Defense counsel did not believe the prosecutor's representation and was almost unceremoniously ejected from the courtroom (E137) in attempting to make what the opinion below calls (A8) "the extraordinary and unprecedented request" that the Court (E141, *et seq.*):

> "allow us to conduct a hearing in relation to the full extent of the consideration that has been given by the government to Mr. D'Onofrio.

* * *

". . . I don't have the subpoena power for the books and records of the Government."

* * *

"But if a jury isn't allowed to see the full four corners of what Mr. D'Onofrio has received from cooperation with the government, it appears to me that the defendant Pfingst will not get a fair trial."

The foregoing remarks, which once again requested full disclosure of any promises, were made vigorously in open court in the presence of the prosecutor. The request for a hearing was denied.

3. The Suppression of the Promises and the Perjury in Relation Thereto.

The prosecutor failed to disclose the foregoing promises and he represented to the district court, in the presence of defense counsel, that no such promises had been made (A8).*

On cross-examination at the trial D'Onofrio was asked by defense counsel about perjury he had admittedly committed in the civil bankruptcy proceeding in order to procure settlement of all of the trustee's claims against him for only a nominal sum. The examination then continued (A35):

"Q. You have never been indicted for this have you?

A. No.

Q. The Government never indicated that they would indict you for this?

A. They never indicated that they would not."

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* He made the same misrepresentations to the Court of Appeals in his brief on petitioner's direct appeal from his conviction which prompted the Court of Appeals to say (Pfingst I, p. 191):

"The Government continues to deny strenuously any such understanding between itself and D'Onofrio on this appeal."

The Court below agrees that the last answer was false (A35). The prosecutor did nothing to correct the false testimony.*

Thereafter the prosecutor on redicrect examination (A33) read aloud (in the presence of the jury) a letter from the I.R.S. indicating that it had begun an investigation of possible criminal tax violations by D'Onofrio. The letter made specific reference to the bankruptcy fraud. The examination then continued:

"Q. All right, has anyone made any promises to you in connection with any one of those investigations?

A. No."

The foregoing answer was also false.** The prosecutor was clearly aware of the promise of non-prosecution for income tax evasion. Two months after the trial, in a telephone conversation with Assistant United States Attorney Brodsky from the Southern District of New York, which conversation Brodsky simultaneously recorded in a written memorandum, the

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* The Court below attributes this failure to correct the false testimony to "inattentiveness" on the part of the prosecutor (A35). The trial judge made no such finding. The prosecutor never claimed inattentiveness. On the contrary, he extensively examined D'Onofrio on redirect with respect to the very affidavit and the very questions that were the subject of this cross-examination (Bank. Transcript, p. 2839). The finding of "inattentiveness" by the Court of Appeals is clearly erroneous.

** The technical explanation offered by the Court of Appeals to excuse this episode (A34) is without justification. It is a virtual certainty that the jury was falsely led to believe by the testimony that no promise had been made to D'Onofrio about nonprosecution for income tax evasion in relation to unreported bankruptcy fraud monies. Regardless of what "prompted" the investigation, the letter says that I.R.S. had become aware of the bankruptcy fraud. The promise of nonprosecution for tax evasion was, therefore, in the context of the trial, a promise made "in connection with" the subject matter of the investigation, ie, D'Onofrio's criminal violation of the tax laws.

prosecutor said: (E40)

> "The deal with D'Onofrio was that he would plead guilty to one count and would not be prosecuted as to income tax evasion for bankruptcy fraud"

B. THE IMPORTANCE OF THE PROMISES IN THE TRIAL CONTEXT.

Long prior to the indictment, D'Onofrio had testified and made affidavits in the civil bankruptcy proceedings and in other proceedings relating to the insolvency. This testimony had exonerated petitioner from any wrongdoing. At the trial D'Onofrio testified that such prior testimony was false and that petitioner had participated in a bankruptcy fraud (Pfingst I, p. 197-198). The critical question in the case, therefore, was this: Was D'Onofrio lying then (in the prior proceedings), or was he lying now (at the trial)?

Since a ruling of the trial judge had precluded petitioner from testifying on his own behalf,* D'Onofrio's prior sworn testimony and statements exonerating him from wrongdoing *constituted petitioner's sole defense at the trial.* The direct and cross-examinations dealt extensively with the subject of D'Onofrio's prior inconsistent testimony and both counsel dealt with it in their summations. It was a central issue in the trial.

Had it not been concealed, the Government's promise not to prosecute D'Onofrio for perjury would have been used by defense counsel in cross-examination and summation to show how the Government, by making this promise, had made it safe for D'Onofrio to repudiate former testimony at will, thereby inculpating Judge Pfingst to his own enormous advantage** -- and at no risk.

D'Onofrio testified falsely at the trial about the perjury promise. The jurors undoubtedly believed his testimony that the

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* *Pfingst I, p. 193*

** See page 10-11, infra.

Government "never indicated that they would not" prosecute him for prior perjury. They had a right to be confident that if that testimony were false the Government would have corrected it. The jurors could reasonably believe that by repudiating his former sworn testimony, D'Onofrio was exposing himself to the risk of a criminal prosecution for perjury. The jurors might well have inquired of themselves: Why would a man lie by admitting to prior perjury when by such lying he would expose himself to criminal prosecution? They had a clear right to know that as a result of assurances given by the Government, *D'Onofrio was not exposing himself to any such risk.* He could lie about his former testimony at will. With this information, conscientious jurors would certainly have been in a much better position to determine whether D'Onofrio was "lying then or lying now" with respect to his testimony about petitioner.

The income tax evasion promise was also very important. D'Onofrio did not pay taxes on his income from the bankruptcy fraud. This admitted failure to report that income resulted in a tax deficiency which the I.R.S. has computed to be $150,000 (Tr. 921).* D'Onofrio's money is in Swiss bank accounts, unreachable by the Government. He invoked the fifth amendment many times about the accounts (A12). Defense counsel could reasonably have argued to the jury that when the Government promised not to prosecute him for tax evasion, it also precluded for all practical purposes, the possibility of collecting that debt thereby placing a substantial monetary *quid pro quo* in the hands of D'Onofrio in exchange for his testimony.

The opinion below describes the promises made as being promises of non-prosecution "for crimes which, but for his testimony, could not have been proved." This assumption of fact in the opinion below which was not found by the district court, or even claimed by the Government,is not supported by the record which establishes the opposite to be true.

When D'Onofrio and Duke negotiated the elements of their proposed bargain with the Government at the meeting of

* This sum, presumably, includes penalties.

September 4, 1970, the perjury D'Onofrio was really concerned about was his false affidavits abbut his own financial condition. He had used them to effect settlement, for a nominal sum, of all outstanding claims with the trustees in two separate bankruptcy proceedings. The Government possessed abundant evidence that at the time D'Onofrio made these "poverty" oaths, he was, in fact, a wealthy man.

With respect to the income tax evasion promise, the Government could tell by simply looking at D'Onofrio's 1966 tax return that the gross income he reported was only a fractional part of the income which the Government claimed he had unlawfully taken from the bankrupt corporations. Duke put the matter clearly when he testified that he said to Lombardino (Tr. 265) "If he is guilty of this crime then presumably he has cheated on his income tax, and I want assurances that he won't be prosecuted for that . . ."

D'Onofrio undoubtedly believed himself to be facing an indictment for bankruptcy fraud, perjury and tax evasion and facing a certain jail sentence. In exchange for testifying against petitioner all of the foregoing was wiped out with the exception of one count of bankruptcy fraud. D'Onofrio then received a suspended sentence. The value to D'Onofrio of the promises made to him was enormous.

The so-called "policy" not to prosecute a defendant "separately" for tax evasion or perjury is alluded to in a number of places in the opinion of the Court below. This policy, if it did exist,* is wholly irrelevant to this case. Certainly D'Onofrio did not expect to be prosecuted "separately" for crimes for which he had previously exacted a promise of non-prosecution.

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* The County executive of Baltimore County in a much publicized case, was recently indicted by a federal grand jury for bribery and extortion. Several months later he was indicted for income tax evasion for failure to report the very income which formed the subject matter of the former indictment. The indictments were consolidated and the trial is now in progress. If this policy exists it is certainly very flexible.

His concern, prior to making the bargain, was an indictment which would include bankruptcy fraud, perjury and tax evasion and which would result in a certain jail sentence.

REASONS FOR GRANTING THE WRIT

The extent of the Government's duty to disclose evidence favorable to an accused has been treated in a number of decisions of this Court beginning with *Mooney* v. *Holohan*, 294 U.S. 103 (1935). In *Napue* v. *State of Illinois*, 360 U.S. 264 (1959), *Brady* v. *Maryland*, 373 U.S. 83 (1963) and *Giglio* v. *United States*, 405 U.S. 150 (1972), the Court spoke to various aspects of the question. As a result of these decisions, the Government's obligation in this area is becoming clear.

What is not clear, however, is the degree of materiality required for a new trial after discovery that the Government has not fulfilled its obligation to disclose favorable evidence. It is upon this important question that *enforcement* of the Government's acknowledged obligation depends. The Court has not yet addressed itself to this question which is ripe for review and for the announcing of appropriate guidelines to assist the lower courts in the disposition of the troublesome questions that frequently arise in these cases.

In *Giles* v. *Maryland*, 386 U.S. 66 (1967), the Court declined an opportunity to deal with this issue, the importance of which was recognized in the plurality opinion. Its timeliness for review is now illustrated by the substantial number of lower court decisions on the subject,* which set forth (sometimes doubtfully) standards for reversal which are by no means uniform, and by the conflict between the second circuit decision below and the

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* *See inter alia: Simos v. Gray, 356 F. Supp. 265 (1973); Hall v. United States, 352 F. Supp. 1144 (1973), United States v. Kahn, 472 F. 2d 272 (2d Cir. 1972); United States v. Kaplan, 470 F. 2d 100 (7th Cir. 1972); United States v. Polisi, 416 F. 2d 573 (2d Cir. 1969); United States v. Keogh, 391 F. 2d 138 (2d Cir. 1968); United States v. Tomaiolo 378 F. 2d 26 (2d Cir. 1967).*

seventh circuit decision in *United States* v. *Kaplan*, 470 F.2d 100 (1972) on the issue of the degree of prejudice required for a new trial where the prosecutor fails to correct false testimony from his principal witness about undisclosed promises of leniency.

I

The Application of the *Miller* Standard of Materiality violates both the due process Principles set forth in *Brady* and the Right to Counsel Provision of the Sixth Amendment.

In deciding whether the Government's non-disclosure of the promises required a new trial in this case, the Court of Appeals applied the *Miller* test (*United States* v. *Miller*, 411 F.2d 825, (2d Cir. 1969) which requires that there be "a significant chance that this added item . . . could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." This test requires the defendant to show substantial prejudice within a context of conjecture and speculation and, it is submitted, is constitutionally unacceptable in a case where, as here, the defense specifically demands information about promises of leniency, of which the prosecutor is aware, and which he fails to disclose.

Brady announced that under such circumstances the Court need not probe the prosecutor's mind to ascertain deliberateness or non-deliberateness, good faith or bad faith. It decided that failure to disclose after specific defense request for the evidence must be treated *as though* the failure to disclose were deliberate, and that a new trial will be required where the evidence is material to the issues and favorable to the defense. It is doubtful that the words "material" and "favorable" as used in *Brady* were ever intended to describe only such evidence as would meet the *Miller* test, involving as it does the application of a standard of prejudice which the Court of Appeals had fashioned for a case *where no pre-trial request had been made* for the non-disclosed evidence. This difference apparently escaped the Court of

Appeals in its preoccupation with the "inadvertent" vs. "willful" aspects of the prosecutor's non-disclosure. After *Brady*, the distinction between inadvertent and willful non-disclosure has no legal significance in a case, such as this, where the defense requests disclosure of promises of leniency, of which the prosecutor is aware and which he fails to reveal.

Cases involving a specific pretrial request for the non-disclosed evidence are different *in kind*, not merely in degree, from those where no request has been made. Such cases involve the right of an accused person and his counsel to plan and conduct the defense free from interference by either the prosecutor or the court. Decisions as to the kind of impeachment attack that will be made and the emphasis and tactics of such an attack belong exclusively to defense counsel. The application of the *Miller* standard to a case of this kind involves a usurpation by the court (after a previous usurpation by the prosecutor) of the prerogatives of defense counsel.

By concealing the promises which had been made, the prosecutor determined the *kind* of impeachment attack that could be effectively mounted by defense counsel. It was one which the prosecutor was prepared to meet. This conventional impeachment attack (that D'Onofrio was a dishonorable, untrustworthy man, unworth of belief) was met with the Government's conventional answer (we often have to use the testimony of such persons, etc.).

The attack which the prosecutor did not want to have to meet (and the effect of which he avoided by the suppression of the promises) is one that is most important, particularly in the defense of an accused public official. It describes the partnership between the prosecution and the unwholesome witness, each for his own ends which enables the prosecutor to bag his trophy in exchange for promises of leniency of high value to his witness.

The defense attempted to mount such an impeachment attack in this case, but it was ineffective because the defense could not (because of the suppression) prove the kind of *quid pro quo* necessary to establish the illicit partnership.

The Courts below dealt extensively with the tactics of D'Onofrio's impeachment and with what defense counsel would or would not have done with the suppressed promises. They treat any further impeachment of D'Onofrio through the use of the non-disclosed promises as being merely cumulative, ignoring the fact that the suppressed promises, in the hands of competent counsel, would have been developed so as to have a substantial impeaching effect upon the *bona fides* of the prosecution. *The cross-examination would have revealed the partnership between D'Onofrio and the prosecutor which the latter had been able to conceal from the jury.*

The percentage of acquittals is higher in cases where the jury feels that its government has not acted properly. Disclosure of a partnership between the prosecutor and his witness in the prosecution of a public official can mean the difference between conviction and acquittal.

The substitution of the judgment of the Court for that of counsel via the application of the *Miller* test, in a case where specific demand has been made for the non-disclosed promises, constitutes a significant intrusion into the area of defense advocacy. it violates not only due process, but also the accused's right to effective counsel* and to plan and conduct his own defense.

II

The Decision below conflicts with a decision of the 7th Circuit, and with Pfingst I, on the Standard of Materiality required for Reversal under *Napue* and *Giglio*.

The Court of Appeals decided that the prosecutor's failure to correct D'Onofrio's false testimony about the promise of non-prosecution for perjury did not require a new trial under *Napue* and *Giglio*. It held that in those cases "the falsely denied

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* *Cf. Spriggs v. Wilson, 491 F.2d 759 (C.A.D.C. 1969).*

promises of leniency constituted the sole meaningful basis for attacking their credibility," whereas in this case "D'Onofrio's false denial nullified no more than a cumulative source of an already demolishing impeachment."

The Seventh Circuit, in dealing with the same question, reached the opposite conclusion in *United States* v. *Kaplan* (*supra*). In *Kaplan* the U.S. Attorney had agreed to bring the witness' cooperation to the attention of his parole board. The promise was not disclosed to the defense and the witness denied any promises on the witness stand. The prosecutor failed to correct the false testimony. The Government aruged that the error did not require a new trial because of the existence of other substantial impeachment evidence (i.e., the witness was a three-time felon who at the time of the trial was serving a sentence for counterfeiting). The Court said:

> "We reject the Government's claim that additional impeachment evidence introduced against Ward, in particular evidence of his prior convictions, served to eliminate the constitutional error."

In *Giglio* this Court made it clear that where the conviction of an accused depends on the testimony of a Government witness, the jury is entitiled to know about *any* promises of leniency made to that witness. This area is far too sensitive and important to permit post-trial second guessing by the prosecutor or the court as to what effect disclosure of such a promise would have had upon the jury at the trial. In Pfingst I, the Court of Appeals, after a lengthy review of this trial record, decided, in accordance with *Giglio*, that suppression of *any* promise of leniency to D'Onofrio would require a new trial.

In Pfingst II on the basis of the identical trial record, the Court of Appeals decided that suppression of proven promises of leniency and the prosector's failure to correct his witness' false testimony denying such a promise did not require a new trial because of the existence and use of other substantial impeachment evidence.

Not only does Pfingst II contradict Pfingst I on this important issue of constitutional law, but it conflicts with the seventh circuit decision in *Kaplan* which had been in harmony with Pfingst I.

The confusion thus generated and the conflict between the two circuits ought to be resolved by this Court if these important due process principles are to receive meaningful and uniform application throughout the federal system.

III

The Court ought to clarify the permissible scope of Court of Appeals review in post-conviction proceedings involving claims of prosecutorial misconduct.

The Court of Appeals applied to this post-conviction suppression case the "narrow scope of review" rules applicable to post-conviction proceedings generally (A22).* There are important reasons why these rules must be relaxed in cases involving claimed violations of the due process principles of *Napue, Brady* and *Giglio.*

In post-conviction hearings of this kind, the prosecutor, in a very real sense, is the defendant. Trial judges must sit in judgment upon prosecutors with whom they transact business on a regular basis, and upon whose honesty and integrity they must and do rely in order to transact the Court's business. The scales of justice are thus heavily weighted in favor of the prosecutor before the taking of evidence begins.

In prosecutorial suppression cases arising in the federal system, proper weight ought to be accorded to the trial judge's findings in cases of disputed testimony according to the circumstances of each case, but in these cases the Court of

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* *Contrary to United States v. Kahn 472 F2d. 272, 287 (2d Cir. 1973) and United States v. Kaplan, 470 F2d. 100, 103 (7th Cir. 1972)*

Appeals ought not to be bound by the rule of *United States* v. *Johnson*, 327 U.S. 106 (1946), or *Zovluck* v. *United States*, 448 F.2d 339 (2d Cir. 1971) relating to the "narrow scope of review" applicable to post-conviction proceedings generally.

An important finding in this case (i.e., non-deliberateness) made by the district court was affirmed by the Court of Appeals, in the face of extremely strong evidence to the contrary, on the ground that it was not "clearly erroneous" within the meaning of *Zovluck* and *Johnson*. (A28).

IV

"Prosecutorial Policy" ought to be permanently eliminated as a device to excuse non-disclosure of promises of leniency.

The Government has devised, and the decision below gives support to the new contrivance of "prosecutorial policy" to excuse non-disclosure of arrangements for leniency to a government witness.

The effect of this decision will be to sharply reduce the frequency of "promises" to cooperative government witnesses with a simultaneous sharp increase in discussions of "policy." These latter discussions are not likely to be revealed in many cases with consequent violations of the constitutionally protected right of accused persons to a fair trial.

In *Giglio*, the Eastern District prosecutor's office invented the device of "erasing" a promise of leniency to avoid the effect of its non-disclosure. The Court of Appeals affirmed, but this Court gave short shrift to the erasure theory and reversed. Now the same prosecutor's office has devised a more flexible and useful device to avoid his constitutional obligation to make disclosure. Those prosecutors who wish to conceal will no longer make promises. They will descirbe policy. It is not difficult to see how almost any kind of promise can be framed in terms of a statement of policy.

These matters reflect adversely upon something no less important than the integrity of federal criminal prosecutions.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 460—September Term, 1973.

(Argued November 6, 1973 Decided December 17, 1973.)

Docket No. 73-2345

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH P. PFINGST,

Appellant.

Before:

KAUFMAN, *Chief Judge,*
SMITH and OAKES, *Circuit Judges.*

Appeal from an order of the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge,* denying a motion for a new trial on the grounds of newly discovered evidence.

Affirmed.

JOSEPH J. MARCHESO, New York City, N. Y., *for Appellant.*

JOSEPH W. RYAN, Jr., Assistant United States Attorney (Robert A. Morse, United States Attorney for the Eastern District of New York, Gavin W. Scotti, Assistant United States Attorney and David G. Trager, Spe-

cial Assistant to the United States Attorney on the brief), *for Appellee.*

KAUFMAN, *Chief Judge:*

On April 27, 1972, after a trial lasting more than one month before Judge Weinstein and a jury in the Eastern District of New York, Joseph Pfingst, a New York State Supreme Court Justice, was found guilty on three counts of a ten count indictment for knowingly and willfully participating in three fraudulent transfers in contemplation of bankruptcy in violation of 18 U.S.C. §152. On the subsequent appeal to this Court, Pfingst alleged numerous errors in the proceeding below. His claims ranged from allegations of erroneous rulings by the trial judge to assertions of prosecutorial misconduct, including the failure to reveal a "deal" with the principal government witness, Ramon D'Onofrio, and the deliberate stimulation of publicity by the government both before and during the trial which allegedly created an atmosphere that precluded a fair trial. After a careful review of the record, we found all of these contentions to be meritless and unanimously affirmed the conviction. *United States* v. *Pfingst*, 477 F.2d 177 (2d Cir.), *cert. denied*, 412 U.S. 941 (1973).

On July 3, 1973, Pfingst moved for a new trial pursuant to Fed.R.Crim.P. 33 on allegedly new information which had come to the attention of Pfingst's counsel, Joseph Marcheso, indicating that the government had suppressed evidence of a mutually beneficial arrangement with D'Onofrio. Pfingst also contended, in support of his motion, that the government had knowingly permitted D'Onofrio to commit perjury at the bankruptcy fraud trial when he denied the existence of certain purported elements of this alleged agreement. After a six-day hearing, which included testimony by Joseph Ryan, the Assistant United States Attor-

ney who prosecuted the bankruptcy fraud trial, Robert Morse, the United States Attorney for the Eastern District (now deceased), Judge Edward Neaher, former United States Attorney for the Eastern District, Anthony Lombardino, former Chief of the Criminal Division for the Eastern District, David Brodsky, Assistant United States Attorney for the Southern District of New York, D'Onofrio, and D'Onofrio's attorney, Steven Duke, Judge Weinstein denied the request for a new trial.[1] Although he concluded that there was a modicum of nondisclosure, Judge Weinstein found even that modest amount was inadvertent, that it did not relate to evidence which was of such high value to the defense that its existence could not reasonably have been overlooked by the government, and that disclosure of this evidence would not have affected the outcome of the trial. Since we must accord substantial weight to the findings of fact below, especially when as here those findings emerge from conflicting testimony, and because we conclude that the district court applied the correct legal standard in evaluating those facts, we affirm.

I.

In order to understand the various claims of suppression made by Pfingst, an extended discussion of the relationship between D'Onofrio and the government, spanning more than three years from the summer of 1970 to the summer of 1973, is required.

On June 10, 1970, a Grand Jury was empanelled in the Eastern District of New York to conduct an investigation

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1 Judge Weinstein treated Pfingst's request for a new trial as one brought pursuant to 28 U.S.C. §2255, as well as Rule 33, Fed.R.Crm.P., because he was uncertain whether Pfingst's claims could properly be considered the product of newly discovered evidence as required by Rule 33. Accordingly, to overcome any bar to a decision on the merits, Judge Weinstein viewed the motion as alternatively grounded.

into the bankruptcy of a Suffolk County dairy, the Evans Amityville Dairy, Inc. and its affiliates, which had occurred in April, 1966. D'Onofrio, who had been a large stockholder in the dairy, learned of this and the fact that an FBI agent, Anthony Scuderi, had been investigating him as well. Accordingly, he decided to approach Scuderi. D'Onofrio offered Scuderi some information about criminal activities unrelated to the bankruptcy matter, and Scuderi referred D'Onofrio to Agent George Binney of the New York office of the FBI.[2]

On July 17, 1970, D'Onofrio met Binney in New York. D'Onofrio expressed a desire to cooperate with the FBI and indicated a hope that, in return, the FBI might help him in the event that his current financial activities should lead to difficulties with the Securities and Exchange Commission. Binney replied that the FBI would make no promises of assistance and would not for any reason countenance illegal activities by D'Onofrio.

On August 31, 1970, D'Onofrio requested a meeting with Lombardino, then Chief of the Criminal Division of the United States Attorney's Office for the Eastern District of New York, to discuss the pending bankruptcy fraud investigation. Three days later, on September 3, the two men met at Lombardino's office, with Agents Scuderi and Binney also in attendance. D'Onofrio stated that he was willing to cooperate in the investigation and queried Lombardino about the possibility of receiving immunity in return. Lombardino flatly refused to grant this quid pro quo but suggested that D'Onofrio would be permitted to plead guilty and his cooperation would be made known to the district court upon sentencing. At no time did D'Onofrio mention his incipient problems with the SEC

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2 Scuderi was assigned to the Babylon, Long Island office.

at this meeting and Lombardino testified at the hearing below that he was unaware of them.[3]

The following day, September 4, D'Onofrio returned to Lombardino's office, accompanied by his attorney, Steven Duke. Duke expressed concern that his client, in recounting the details of the bankruptcy fraud, would be admitting perjury with respect to prior testimony before the New York State Department of Agriculture and Markets and other agencies investigating the bankruptcy, as well as subjecting himself to criminal and civil liability for tax evasion from the unreported bankruptcy fraud income. Duke, therefore, sought assurances from Lombardino that D'Onofrio would not be prosecuted for these bankruptcy fraud related crimes.[4] Lombardino responded that such assurances were possible but made no firm commitment to Duke and D'Onofrio. A few days later, however, after Lombardino had received approval from Judge Neaher, then United States Attorney for the Eastern District, Lombardino telephoned Duke and informed him that the Eastern District would use its best efforts to prevent D'Onofrio's prosecution for these two crimes.

Soon thereafter the bankruptcy fraud investigation was turned over to Ryan, and Lombardino ceased his involvement in the case. Ryan conducted a number of interviews with D'Onofrio in preparation for his forthcoming appearance before the Grand Jury. At one of these, D'Onofrio

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3 Binney's report of the July 17, 1970 interview was not transmitted to the Eastern District Office until March 9, 1972, following the trial court's request that Ryan obtain all FBI reports of D'Onofrio interviews.

4 Duke testified at the hearing that although he requested these assurances from Lombardino, he thought it at most a remote possibility that D'Onofrio would be separately prosecuted for these bankruptcy fraud related crimes. In Duke's words, "it seemed to me that it was against the policy of the Department of Justice to prosecute people separately for what is in essence a single course of conduct."

repeated his concern over a possible perjury prosecution arising out of his false testimony in the prior bankruptcy proceedings, and Ryan assured him that this should not be a matter of concern as long as D'Onofrio testified truthfully before the Grand Jury and at the subsequent trial. On December 20 and 21, 1970, D'Onofrio testified extensively before the Grand Jury and on February 8, 1971, the Grand Jury returned a ten count bankruptcy fraud indictment charging D'Onofrio, Pfingst and James Feeney with various violations of 18 U.S.C. § 152.

Almost immediately after this indictment was handed down, on February 11, 1971, Marcheso wrote to Neaher, the United States Attorney, seeking to expedite pretrial discovery. The letter began,

> Pursuant to our conversation I am making with this letter a formal request for discovery. It is understood that this is done to expedite preparation of the trial and does not in any way prejudice my client's rights to make formal discovery motions.

It continued by requesting various documents including *inter alia:*

> 7. A brief statement indicating if any promises or assurances were made to defendant D'Onofrio which could reasonably give hope to defendant D'Onofrio for lenient treatment as a result of his testimony;

The record does not indicate whether the government responded to request #7 and it was *not* repeated by Marcheso in Pfingst's formal motion for discovery filed May 7, 1971.

During the early spring of 1971, Ryan was informed by an SEC official, who had read about the indictment in the newspaper, that the SEC was investigating D'Onofrio's involvement to certain securities transactions which in-

cluded D'Onofrio's use of various Swiss bank accounts. Ryan subsequently learned that the SEC believed Pfingst had some connection with the Swiss bank accounts as well. Although these Swiss bank matters did not appear to Ryan to have a significant relationship to the bankruptcy fraud, Ryan thought it important to inquire about the scope of these activities in the event that Pfingst sought to use this information to undermine D'Onofrio's credibility on cross-examination. Ryan also testified at the hearing before Judge Weinstein that he was concerned Pfingst might argue that D'Onofrio had received some promise of immunity from prosecution for securities violations, in return for his testimony against Pfingst, and Ryan therefore emphatically told the SEC to continue its investigation. Ryan then spoke to Neaher about the Swiss bank account situation and Neaher communicated with Duke, requesting him to obtain information about the matter from D'Onofrio. Duke responded that such revelation might well entail self-incrimination by D'Onofrio but that he would convey the request to his client.

On July 1, 1971, Ryan met with Duke and D'Onofrio to discuss the entry of a guilty plea by D'Onofrio on the bankruptcy fraud indictment. At the meeting, Ryan queried the two men about whether they believed any promises had been made to D'Onofrio to induce his guilty plea, aside from dismissal of the remaining counts and a favorable sentencing recommendation. Duke then mentioned Lombardino's assurance that D'Onofrio would not be prosecuted for tax evasion flowing from the unreported bankruptcy fraud income.[5] Ryan responded that despite what Lombardino may have said, no one in the Eastern

5 There is no evidence that at this meeting either Duke or D'Onofrio sought confirmation of Lombardino's second assurance that there would not be a perjury prosecution for D'Onofrio's false testimony during the bankruptcy proceedings.

District could guarantee that D'Onofrio would not be prosecuted for tax evasion because the IRS initiated such prosecutions *sua sponte* and could not always be dissuaded from proceeding. Ryan added, however, that it was the policy of the office not to prosecute an individual twice for essentially the same conduct. The three men also discussed D'Onofrio's Swiss bank activities but, according to Ryan, only in sketchy terms since D'Onofrio was reluctant to say more.

On July 22, 1971, D'Onofrio pleaded guilty to one count of bankruptcy fraud before Judge Bartels. At the plea hearing, the court inquired about possible inducements to obtain the guilty plea and D'Onofrio stated that the only promise he had received from the government concerned the dismissal of the remaining counts and a favorable recommendation on sentencing. Pfingst's attorney, Marcheso, was also present at this hearing before Judge Bartels and made the rather extraordinary and unprecedented request that an evidentiary hearing be held to determine whether any additional considerations prompted D'Onofrio's plea. Marcheso's only specific reference was to D'Onofrio's alleged "failure to pay hundreds of thousands and probably more in income taxes from investigations arising out of the Eastern and Southern Districts of New York." Ryan denied that there were any considerations in addition to those explicitly noted by D'Onofrio, and Judge Bartels refused to accede to Marcheso's demand for a further inquiry.

Several weeks after the entry of the plea, there occurred a startling event which sharply altered what heretofore had been government preparation directed solely toward a bankruptcy fraud trial against Pfingst and Feeney. Frederick Fellman, a former Babylon Town Republican leader, confessed to the FBI that he had purportedly accepted a $50,000 bribe from Pfingst in order to secure the nomination for him as the Republican Party's candidate for Jus-

tice of the New York State Supreme Court in 1968. Although D'Onofrio had once mentioned the bribery scheme to an FBI agent in January, 1971, a bribery prosecution seemed insupportable until Fellman's confession. Now, however, Ryan thought the bribery case to be strong. Ryan realized, moreover, that the Swiss bank account activities, which had appeared to have no direct relevance to the bankruptcy fraud prosecution, would play a significant part in the bribery case because one of the Swiss accounts was the alleged source of the $50,000 bribe. Accordingly, recalling D'Onofrio's reticence at revealing information about these accounts, Ryan contacted John Keeney, Chief of the Frauds Section of the Department of Justice, to determine what measures might be taken to assure D'Onofrio's cooperative testimony concerning the Swiss accounts.

On August 18, 1971, Morse, who, through Gavin Scotti of the Department of Justice, had been informed of Keeney's response, wrote a memorandum to Ryan in which Morse indicated that Keeney believed a grant of formal immunity to D'Onofrio would be inappropriate, because of possible complications with the bankruptcy fraud charge to which he had already pleaded guilty. The memorandum continued, though, that Keeney thought D'Onofrio could be informed that

> Grand Jury testimony will not be used for taxation prosecution and this would constitute a preclusion from prosecution for criminal tax violation and a letter would be put into the file. However, he would be responsible for civil penalties, all of which would add up to an informal grant of immunity.[6]

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6 This August 18, 1971 memorandum from Morse to Ryan was not disclosed to Pfingst before either the bankruptcy fraud or the bribery trials. It was released to Pfingst pursuant to a subpoena in connection with the instant motion for a new trial.

Armed with this authorization to grant D'Onofrio "informal" immunity from tax evasion prosecution which might arise out of his Swiss bank account revelations, Ryan met with Duke and D'Onofrio on August 18. Ryan's advance preparation proved unnecessary, however, for, according to testimony by both Duke and Ryan at the hearing, the subject of tax evasion never was discussed at this meeting. Ryan testified, therefore, that he had no cause to utilize the authorization he had secured. Rather, Ryan and Duke focussed their discussion on the draft of the bribery indictment already drawn by Ryan, in which Ryan had included D'Onofrio as a co-defendant. Duke argued that D'Onofrio was simply too tangential a figure in the bribery scheme to be joined in the indictment. And, he added that the publicity attendant to the announcement of the indictment might make it difficult for D'Onofrio to obtain his Swiss bank account records. Although the meeting closed without any definite conclusions having been reached on the indictment, Ryan called Duke a few days later and informed him that D'Onofrio would not be recommended for indictment.

In late August, following this meeting, D'Onofrio testified before the Grand Jury that was investigating the alleged bribery of Fellman. On September 1, 1971, the Grand Jury returned a bribery indictment naming Pfingst and Fellman as co-defendants. Immediately thereafter, the government moved for a trial preference in the bribery case and asked that it be held within 60 days; Pfingst successfully objected.

The government now commenced preparation in earnest for both trials. In November, 1971, in response to a pretrial discovery motion by Pfingst, Ryan was ordered to furnish a statement concerning all government investigations of D'Onofrio. Ryan thereupon requested such information from the SEC and the Internal Revenue Service. The SEC responded with two letters disclosing a total of seven in-

vestigations involving D'Onofrio. The letter which Ryan received from the IRS indicated that it had begun an investigation of D'Onofrio in May, 1971 but due to workload pressures and upon learning of the bankruptcy prosecution pending in the Eastern District, it had decided to temporarily suspend further investigation. The three letters were given to Pfingst.

During the period from November, 1971 to March, 1972, both the government and Pfingst pressed D'Onofrio for additional information concerning the Swiss bank accounts. On March 3, 1972, the court ordered D'Onofrio to produce various records in response to a subpoena issued on Pfingst's behalf. D'Onofrio refused and a hearing was set for March 10 to determine if this refusal was justified. At that hearing, D'Onofrio asserted his Fifth Amendment privilege against self-incrimination, which the court accepted as a bar to further discovery.

On March 10, the same day as the hearing, Judge Weinstein, acceding to Pfingst's specific request, set down the bankruptcy fraud case to proceed to trial before the bribery case, fixing the commencement of the trial for March 24, 1972. With the bankruptcy fraud trial now only two weeks away, Ryan and D'Onofrio met on a number of occasions to review D'Onofrio's testimony. During one such interview, Ryan asked D'Onofrio to state the extent of any promises made to him by the government, and D'Onofrio replied that he had been assured that he would not be prosecuted for income tax evasion on unreported income from the bankruptcy fraud. Ryan, according to his testimony at the hearing,

> immediately picked up the phone, very excited by this statement of [D'Onofrio's], and . . . told . . . Duke: "D'Onofrio's now claiming some kind of informal immunity on income tax matters and you better get this

> straightened out right now . . . . I'm going to put him on the phone and you better talk to him because there is no such understanding, and you better clear up any misapprehensions.

And, at a subsequent pretrial interview, Ryan again asked D'Onofrio about his understanding with respect to any promises relating to tax evasion, to which D'Onofrio replied that he understood that there were none.

The bankruptcy fraud trial began on March 24, 1972 and, as expected, D'Onofrio was the key government witness. However, with respect to the critical issue—whether the admitted payments to Pfingst by the bankrupt dairy corporations were bona fide legal fees for services rendered or illicit cash contributions to Pfingst as a stockholder—the government submitted documentary evidence corroborating D'Onofrio's testimony that the latter was the case. Moreover, D'Onofrio's credibility was sharply attacked in the course of five days of vigorous cross-examination. Marcheso repeatedly questioned D'Onofrio about his various stock manipulation schemes, the subject of the multiple SEC investigations. D'Onofrio pleaded the Fifth Amendment at least thirty times in response to these inquiries. Little of D'Onofrio's cross-examination was directed to other crimes arising out of the bankruptcy fraud itself. Marcheso asked a mere six questions about the possibility of a perjury indictment resulting from the filing of a false affidavit in the bankruptcy proceedings by D'Onofrio, and asked not a single question about the likelihood of a tax evasion prosecution for unreported bankruptcy fraud income. The net effect of this assault on D'Onofrio's credibility was not without success. As we noted on Pfingst's direct appeal,

> Indeed, on the charges of which Pfingst was acquitted the evidence was limited to D'Onofrio's testimony,

while on the charges of which Pfingst was convicted, in contrast, documentary evidence and the testimony of other witnesses corroborated D'Onofrio's version of the events.

United States v. *Pfingst, supra,* 477 F.2d at 183.

The bankruptcy fraud trial concluded on April 27, 1972. The bribery trial was scheduled to commence one month later. In preparatory discussions for the second trial with D'Onofrio and Duke, Ryan indicated that it might become necessary to confer immunity on D'Onofrio to insure full disclosure of the Swiss bank transactions. Ryan explained that because of the possible materiality of this information, D'Onofrio's invocation of the Fifth Amendment might well lead the court to strike his testimony,[7] a result which the government sought strenuously to avoid. Duke responded that D'Onofrio would prefer not to elaborate upon his Swiss bank activities, for personal safety reasons among other considerations. He added that he believed the offer of immunity to be a "breach of faith" by the government, since D'Onofrio had understood that he would not be required to testify in detail about these accounts. Ryan retorted that there was no basis for such an understanding and that D'Onofrio would be granted immunity if events at the upcoming bribery trial so required.[8]

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7 *See United States* v. *Cardillo,* 316 F.2d 606, 610-613 (2d Cir.), *cert. denied,* 375 U.S. 822 (1963).

8 At the hearing, Duke testified that he recalled this so-called "breach of faith" discussion to have occurred at a meeting with Ryan in March, 1972 and not at a meeting subsequent to the bankruptcy fraud trial. Although Judge Weinstein does not appear to have made a finding of fact with respect to this point, we consider the conflict to be immaterial. Irrespective of the time when this discussion took place, Ryan's position, which Duke did not dispute, demonstrates that any "understanding" about the extent of Swiss bank account testimony was unilateral in nature—i.e. solely in the minds of D'Onofrio and Duke.

At this pre-bribery trial interview, Duke also questioned Ryan about the possibility of an assurance that D'Onofrio would not be prosecuted for perjury should his bribery trial testimony reveal prior false statements made under oath in the course of SEC investigations. Ryan noted that he was aware of only one such investigation, an SEC proceeding involving the A.K. Electric Corporation. At that time D'Onofrio had given false testimony concerning the sale of some A.K. Electric stock, which had allegedly been used as collateral for the bribe funds. Since Ryan fully expected D'Onofrio to repudiate his former SEC testimony at the bribery trial, therefore, he expressed his belief that, as with the bankruptcy fraud related perjury, the government would not be likely to prosecute. Ryan, however, could not guarantee that no prosecution would be instituted because jurisdiction over such action rested in the United States Attorney's Office for the Southern District of New York rather than in his office.

On May 27, 1972, the bribery trial commenced with Judge Weinstein presiding. D'Onofrio testified, in response to questioning by the government, that Pfingst had instructed D'Onofrio to withdraw all of Pfingst's funds from his Swiss bank accounts, one of which, named "Chipmunk," was wholly owned by Pfingst while a second, "Egypt," was jointly owned by Pfingst and D'Onofrio. Pursuant to these instructions, D'Onofrio stated that he delivered $75,000 to Pfingst.

On cross-examination, D'Onofrio at first refused to answer whether he owned any Swiss accounts other than "Egypt." Under the threat of contempt, D'Onofrio responded that he owned an account under the code name "Gypsy." Marcheso then asked D'Onofrio whether any part of the $75,000 came from this account, since the bank record produced in court disclosed that only $56,000 was withdrawn from "Chipmunk" and "Egypt." D'Onofrio

admitted it might have, but said he could not recall. D'Onofrio then repeatedly refused, in the presence of the jury, to consent to an examination of the bank records of "Gypsy," steadfastly invoking his Fifth Amendment privilege against self-incrimination.

Following a hearing outside the presence of the jury, Judge Weinstein ruled that D'Onofrio had waived his Fifth Amendment privilege in testifying about "Gypsy" and held him in contempt for his refusal to sign the authorization necessary to release the bank records under Swiss law. Pursuant to this contempt citation, D'Onofrio spent the remainder of the trial in jail, some twenty-two days, and was fined $10,000. Judge Weinstein, however, declined to strike D'Onofrio's testimony. At the conclusion of the trial, the jury returned a verdict of not guilty.

A few weeks after the close of the bribery trial, on July 18, 1972, Ryan visited David Brodsky, an Assistant United States Attorney in the Southern District, who had been investigating D'Onofrio's possible securities frauds. At this meeting, Ryan and Brodsky discussed the means used by Ryan to gain D'Onofrio's cooperation, because Brodsky believed that D'Onofrio's cooperation would be helpful in the securities fraud investigation. Before Ryan left, he agreed to furnish Brodsky with the transcripts of the two Pfingst trials.

The next day, July 19, an informant telephoned Brodsky to advise him that D'Onofrio was planning to leave the United States. Brodsky, anxious to prevent this departure, immediately sought a basis upon which to file a complaint against D'Onofrio. He had a copy of the testimony which D'Onofrio had given before the SEC in a civil action, *Matter of Harwyn Industries, Inc.* and, after obtaining a copy of the bribery trial transcript from Marchesco (Ryan, according to Brodsky's testimony at the hearing, was "away" at this time) noted that D'Onofrio had testified

falsely in *Harwyn*. Brodsky thereupon filed a perjury complaint on July 20, 1972 and an arrest warrant was issued.

Despite Brodsky's prompt efforts, D'Onofrio succeeded in fleeing to Mexico. Upon learning of the complaint, however, D'Onofrio contacted Brodsky and informed him that Duke would speak with Brodsky about the matter. On July 25, 1972, Duke met Brodsky at a Manhattan apartment. During their conversation, Duke told Brodsky that D'Onofrio had received oral assurances from various members of the Eastern District Office that D'Onofrio would not be prosecuted for either perjury or tax evasion revealed by his testimony at the Pfingst trial. Brodsky recorded the substance of Duke's claims in a memorandum to be placed in his file as follows:

a. (per Morse, Lombardino and Ryan): full transactional immunity for prior perjury which he disclosed by his *Pfingst* testimony.

b. (per Morse, Lombardino and Ryan): immunity as to income tax evasion for years 1965-1966 for any funds derived from bankruptcy case.

c. (per Morse and Ryan): immunity as to income tax evasion as to matters disclosed in *Pfingst* testimony if such testimony revealed income.[9]

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9 This memorandum, dated July 25, 1972, was submitted by Pfingst as an exhibit to his motion for a new trial. At the hearing below, Duke testified that while the Brodsky memorandum accurately reflected Duke's "legal position" as represented to Brodsky, Duke "didn't state [to Brodsky] that anybody used those words." In fact, the following colloquy between Marcheso and Duke suggests the rather amorphous basis for Duke's "understanding":

> Q. Now, what the Court and everybody else want to know is what was said to you concerning these assurances?
>
> A. Apart from the conversation with Tony Lombardino [September 4, 1970], I cannot recall what the reaction was to what I stated

Immediately after this meeting, Brodsky telephoned Ryan to determine the accuracy of Duke's statements. Ryan responded that the only formal promise which D'Onofrio had received was that he would be allowed to plead guilty to one count of bankruptcy fraud and that his cooperation would be made known to the court at the time of sentencing. Ryan added that D'Onofrio had been told that since, as a matter of policy, the government would not twice prosecute an individual for essentially the same course of conduct, D'Onofrio need not be concerned about a subsequent prosecution for tax evasion for the unreported income arising out of the bankruptcy fraud. Ryan denied that any additional assurances, informal or otherwise, were made to D'Onofrio.[10]

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to be my understanding, except to say that when I stated what my understanding was it was never repudiated, to my knowledge.

Furthermore, even this last statement by Duke—that his understanding was never repudiated—is somewhat contradicted by his later testimony during the following exchange with Marcheso:

Q. Did he [Ryan] say anything to you that would indicate that you did not have that assurance [that D'Onofrio would not be prosecuted for income tax evasion revealed by his testimony in the bankruptcy case]?

A. No, I would say would I—whatever he said was calculated to indicate to me that he was—that was something that he did not directly deal with; that he was not making assurances.

10 Brodsky embodied the essence of this conversation with Ryan in a memorandum for his file, submitted by Pfingst at the hearing below, in the following cryptic terms:

The deal with D'Onofrio was that he would plead guilty to one count and would not be prosecuted as to income tax evasion for bankruptcy fraud.

Nothing was said about perjury immunity.

Duke said to Ryan that he didn't want D'Onofrio to have transactional immunity—said he would withdraw.

No agreement as [sic] all on informal immunity.

At the hearing, Brodsky confirmed that this memorandum represented the substance of his conversation with Ryan. Morse testified, however,

The following day, Brodsky, seeking a more formal confirmation of the inaccuracy of Duke's claims, sent a letter to Morse, with attention to Ryan and copies to Judge Neaher and Lombardino, reiterating Duke's position that D'Onofrio had been granted informal immunity from perjury and tax evasion prosecutions. Brodsky requested that Ryan investigate these assertions and reply in writing as to their veracity.

On July 27, 1972, D'Onofrio terminated his fugitive status and returned from Mexico to his home in St. Petersburg, Florida, where he was arrested and brought to New York. On August 7, 1972, a Grand Jury in the Southern District of New York returned a 32 count indictment charging various violations of the securities laws. D'Onofrio was named in two counts of that indictment.

Ryan, of course, learned of D'Onofrio's arrest and subsequent indictment. Preliminary to drafting a response to Brodsky's letter, Morse and Ryan discussed these events. Ryan expressed his belief that it would be unwise to prosecute D'Onofrio for the perjury revealed by his testimony at the bribery trial, although similar considerations did not apply to prosecutions for the underlying securities law violations, because as to these there was likely to be independent evidence.

On August 10, 1972, Morse wrote to Whitney North Seymour, Jr., then United States Attorney for the Southern District, explaining the position of the Eastern District concerning future prosecution of D'Onofrio. The letter reflected the view that, both as a matter of policy and fairness, any prosecution of D'Onofrio should be based on evi-

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that in a conversation with Brodsky subsequent to July 25, Brodsky admitted that Ryan had never used the term "deal" and that Brodsky's use of that word was a "sloppy" characterization of what Ryan had told him.

dence independent of his testimony at the Pfingst trials. It read, in pertinent part:

> "However, before furnishing these transcripts [of the Pfingst trials], we would inform you that in our view it would be inadvisable to predicate future prosecutorial action against Mr. D'Onofrio on the testimony given by him as a Government witness in the Pfingst trials, and suggest that such prosecutions continue on evidence obtained independently and from other sources.
>
> "This conclusion is based on two factors: First, as a matter of prosecutorial policy we question the wisdom of subsequently using the evidence given by a cooperating Government witness against him, where the testimony is believed by the Government to be truthful. Such action by the Government would serve to inhibit cooperating witnesses from giving full and frank testimony, particularly on cross-examination by defense counsel.
>
> "Second, from the facts and circumstances under which Mr. D'Onofrio cooperated and testified at the Pfingst trials, there is a risk that a court might possibly conclude that Mr. D'Onofrio was lead [sic] to believe that any truthful evidence he provided as a cooperating witness would not later be used by the Government to incriminate him. He was encouraged by our office and the Federal Bureau of Investigation to produce evidence and testify fully in order to avoid any prejudice to the Government's case by a plea of his privilege against self-incrimination. Mr. D'Onofrio produced evidence relevant to the Pfingst trials, including Swiss bank records, and testified up to a point on cross-examination where he invoked his privilege against self-incrimination concerning certain business activities.

> "This does not mean that Mr. D'Onofrio is immune from further criminal prosecution. No representations were made that Mr. D'Onofrio would be immune from future prosecutorial action by other agencies. We specifically mentioned to him several pending investigations by the Internal Revenue Service and Securities & Exchange Commission, and Mr. D'Onofrio testified that he expected to face such action."

Brodsky testified at the hearing on the motion for a new trial that, as a matter of comity, his office agreed to comply with the wishes of the Eastern District and to proceed against D'Onofrio on the basis of independent evidence alone.

While D'Onofrio was scheduled to plead to the pending indictment on August 21, 1972, he fled the country and became a fugitive for a second time. In his absence, four additional indictments were returned against him in the Southern District of New York, three charging securities laws violations and the fourth containing the perjury charge on which D'Onofrio had originally been arrested.

D'Onofrio was finally recaptured in London on March 15, 1973. In order to obtain his extradition, Brodsky was required to prove the outstanding perjury charge to the satisfaction of a British Magistrate. Brodsky proceeded to do this on the basis of D'Onofrio's testimony at the Pfingst bribery trial. Before the extradition proceedings were completed, D'Onofrio agreed to return voluntarily to the United States. Under the terms of this agreement, he would be permitted to plead guilty to the four Securities Act indictments—the one filed on August 7, 1972 and the three subsequently handed down—with the fifth indictment, based on the perjury charge, to be dismissed. Although D'Onofrio has not as yet been sentenced, he faces a maximum of seventeen years for the crimes to which he has pleaded.

On July 3, 1973, Pfingst made his application before Judge Weinstein for a new trial, the denial of which is now before us. Pfingst claimed that the government had suppressed the full extent of its arrangement with D'Onofrio and alleged the existence of the following six undisclosed elements of that arrangement:

1. an agreement that D'Onofrio would not be indicted or named as a co-conspirator in the bribery case;
2. an agreement that D'Onofrio would not be granted immunity in order to compel full revelation of his Swiss bank activities;
3. an assurance that D'Onofrio would not be prosecuted for income tax evasion based on unreported bankruptcy fraud income;
4. an assurance that D'Onofrio would not be prosecuted for his perjurious testimony in the course of the prior bankruptcy proceedings;
5. an assurance that D'Onofrio would not be prosecuted for perjury as a result of false testimony before the SEC;
6. an assurance that D'Onofrio would not be prosecuted for income tax evasion on the basis of unreported income derived from his stock manipulation transactions.

Pfingst also contended that in two instances the government had failed to correct false testimony by D'Onofrio at the bankruptcy fraud trial.

After sifting through six days of often conflicting testimony, Judge Weinstein concluded that the government had made no formal promises to D'Onofrio aside from those revealed at his plea hearing on July 22, 1971 before Judge

Bartels—i.e. dismissal of the remaining counts in the bankruptcy fraud indictment and a favorable sentencing recommendation. He did find, however, that primarily based on discussions with Lombardino and Neaher, D'Onofrio had received assurances, although indirect and implied in nature, that he would not be prosecuted for tax evasion based on unreported bankruptcy fraud income or perjury committed during prior bankruptcy proceedings. Judge Weinstein found these to be the only assurances which D'Onofrio had been given prior to the bankruptcy fraud trial. Beyond that, he characterized Duke's statements to Brodsky as "his legal contentions and not what in fact was offered as an inducement to D'Onofrio."

Although the district court agreed with Pfingst that the government erred in failing to disclose these two policy based assurances, he explicitly "reject(ed) the claim that Ryan deliberately mislead [sic] anyone." Moreover, Judge Weinstein did not consider the undisclosed evidence to be of critical importance to Pfingst and concluded that its revelation would not have affected the verdict. Accordingly, finding no merit as well in Pfingst's alternative grounds—the government's failure to correct D'Onofrio's allegedly false testimony at trial—Judge Weinstein denied the motion for a new trial.

II.

Because the district court's findings of fact played a crucial role in the decision below, we believe it essential at the outset of our discussion to reiterate the narrow scope of our review of such findings. On appeal, we will not disturb findings of fact, determined after a hearing on a motion made pursuant to 28 U.S.C. §2255 unless those findings are clearly erroneous. *Zovluck* v. *United States*, 448 F.2d 339 (2d Cir. 1971), *cert. denied*, 405 U.S.

1043 (1972).[11] This standard of review is particularly appropriate in this case for an evaluation of the credibility of the witnesses who testified before the district judge was of fundamental importance in the resolution of conflicting testimony. Thus, we find adequate support in the record to sustain Judge Weinstein's finding that the only assurances the government failed to disclose concerned tax evasion and perjury committed by D'Onofrio in the course of the bankruptcy fraud.

Pfingst's claim that, in return for his cooperation, D'Onofrio was neither indicted nor named as a co-conspirator in the bribery case, is no more meritorious now than when we rejected it on direct appeal. *See United States* v. *Pfingst, supra,* 477 F.2d at 192. Although Ryan had originally included D'Onofrio's name in the indictment, his decision to excise it, following the August 18, 1971 meeting with Duke and D'Onofrio, can more reasonably be explained as an act of prosecutorial discretion rather than as a concession demanded by D'Onofrio in return for his cooperation. At that time, D'Onofrio faced as much as a five year prison sentence on the bankruptcy fraud count to which he had already pleaded guilty. Moreover, as we noted in *Pfingst I,* D'Onofrio was at most a peripheral participant in the bribery scheme.

Appellant's contention that the government's arrangement with D'Onofrio included a promise not to grant him immunity in order to compel disclosure of the full scope of his Swiss bank activities is similarly without merit. This claim, too, was made and rejected on direct

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11 Because appellant initially moved for a new trial under Fed.R.Crim.P. 33, we should add that a similar if not stricter standard applies to appellate review of findings enunciated subsequent to a hearing on a Rule 33 motion. In that instance, findings of fact are to be sustained unless "wholly unsupported by evidence." *United States* v. *Johnson,* 327 U.S. 106, 111-112 (1946).

appeal and, if anything, the additional evidence adduced below only strengthens our conclusion that no such arrangement existed. Although Ryan possessed authorization to grant use immunity to D'Onofrio at both trials, in the face of the not insubstantial number of SEC investigations then pending,[12] he was understandably hesitant to do so. There was, moreover, little need for D'Onofrio's Swiss bank account testimony at the bankruptcy fraud trial and, though of greater relevance in the bribery trial, the wisdom of an immunity grant in that case would have been sharply questioned in view of Judge Weinstein's ruling that D'Onofrio had waived his Fifth Amendment privilege.

With respect to Pfingst's allegation that the government assured D'Onofrio that he would not be prosecuted for his perjurious testimony before the SEC, the record discloses the critical question to be when, and not whether, such assurance was given.[13] Judge Weinstein found, and we agree, that the subject of D'Onofrio's perjury before the SEC was not discussed until some time between the bankruptcy fraud and bribery trials. Duke testified that at the time of his discussion with Lombardino, which was the source of the assurance that there would be no prosecution for the bankruptcy fraud related perjury, he did not mention D'Onofrio's difficulties with the SEC. Duke did recall that subsequently he raised the problem of D'Onofrio's perjury before the SEC with Ryan, but he could not remember when this

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12 The SEC had in fact opposed granting D'Onofrio immunity when Ryan requested the Commission's view in the course of applying for immunity authorization from the Department of Justice.

13 Morse's letter to Seymour of August 10, 1972 appears to confirm that at some point during the extended relationship between D'Onofrio and the Eastern District, an assurance was given with respect to SEC perjury disclosed by D'Onofrio's Swiss bank account testimony at the bribery trial.

conversation occurred. Since we believe it more reasonable that the topic would arise in preparation for the bribery trial in which, unlike the bankruptcy fraud trial, the Swiss bank account testimony was expected to and did play a major part, we credit, as did Judge Weinstein, Ryan's recollection that this particular discussion with Duke transpired between the two trials.

Pfingst's final claim of nondisclosure by the prosecutor rejected below relates to an alleged assurance that D'Onofrio would not be prosecuted for tax evasion based on unreported income derived from his stock manipulation ventures. Pfingst relies on the August 18, 1971 memorandum from Morse to Ryan containing Keeney's suggestion that D'Onofrio could be told that he would have "informal immunity" from tax evasion disclosed by his testimony before the Grand Jury investigating the bribery charge. Both Duke and Ryan testified, however, that the question of D'Onofrio's tax evasion was not discussed between the two men at their meeting on August 18, 1971 or indeed, at any time thereafter. Duke reiterated that the original and sole source of his belief in D'Onofrio's "informal immunity" from tax evasion was Lombardino, with whom Duke had never broached the subject of tax evasion for unreported income earned subsequent to the bankruptcy fraud. Accordingly, we conclude that while the August 18, 1971 memorandum represented authorization to confer informal immunity for post-bankruptcy fraud tax evasion on D'Onofrio, such assurance was never communicated to him.[14]

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14 Nor do we believe that the government had an obligation to disclose the August 18, 1971 memorandum to Pfingst in the course of pretrial discovery. Fed.R.Crim.P. 16(b) explicitly protects such intra-office memoranda from discovery, stating in pertinent part:

> [with exceptions not relevant], this rule does not authorize the discovery or inspection of reports, memoranda, or other internal gov-

Having established the parameters of the government's nondisclosure, we must now determine whether, in the context of this case, either for prophylactic reasons or considerations of fairness to the defendant, such nondisclosure requires a new trial. We said in *Kyle* v. *United States*, 297 F.2d 507, 514 (2d Cir. 1961),

> The reason why the showing of prejudice required to bring down the balance in favor of a new trial will vary from case to case is that the pans contain weights and counterweights other than the interest in a perfect trial. Sometimes only a small showing of prejudice, or none, is demanded because that interest is reinforced by the necessity that "The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach," People v. Savvides, supra, and by the teaching of experience that mere admonitions are insufficient to prevent repetition of abuse. See Mapp v. Ohio, 367 U.S. 643, 650-653, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). In other cases, where the conduct of the trial has been less censurable, or not censurable at all, a greater showing of prejudice is demanded, because the interest in obtaining an ideal trial, with the trier of the facts considering all admissible evidence that has ever be-

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ernment documents made by government agents in connection with the investigation or prosecution of the case . . . .

We do not find, moreover, that in restricting discovery in this manner, Rule 16(b) contravenes the constitutional command for due process, as interpreted in *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), to require disclosure, upon request, of evidence which is material and favorable to the defense. In this instance, the balancing of interests inherent in the due process formulation clearly favors the prosecution's need for protecting communications concerning legitimate trial tactics, especially in view of the necessarily speculative nature of such memoranda. Even in the far more liberal realm of civil discovery, memoranda falling in the category of attorney work product receive protection from discovery. *See* Fed.R.Civ.P. 26(b)(3).

> come available, and nothing else, is not thus supplemented and may be outweighed by the interest in avoiding a retrial unlikely to have a different outcome—an interest especially weighty when, as is normally true on collateral attack, the second trial will come long after the first.

In *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973) we recenty reiterated the governing standard where nondisclosure is the result of prosecutorial misconduct.

> If it can be shown that the government deliberately suppressed the evidence, a new trial is warranted if the evidence is merely material or favorable to the defense. [citations omitted]. The same rule applies, even in the absence of intentional suppression, if it appears that the high value of the undisclosed evidence could not have escaped the prosecutor's attention. [citations omitted]. In each of these instances, the materiality of the evidence is measured by the effect of its suppression upon preparation for trial, rather than its predicted effect on the jury's verdict. [citations omitted].

Judge Weinstein found that Ryan's failure to disclose the assurances given to D'Onofrio with respect to perjury and tax evasion revealed by his truthful testimony at the bankruptcy fraud trial was not deliberate. Although aware of these assurances, Ryan believed them to be statements of sound prosecutorial policy—to refrain from multiple prosecutions for crimes arising out of essentially a single course of illegal conduct—rather than a quid pro quo for D'Onofrio's cooperation with the government. Convincing evidence of Ryan's mental attitude can be found in his strenuous efforts at one pre-bankruptcy fraud trial inter-

view to disabuse D'Onofrio of his belief that there was some understanding with respect to tax evasion. To Ryan, there was simply no "understanding," and no agreement embodying a cause and effect relationship between D'Onofrio's decision to testify and the government's determination not to prosecute him for the tax evasion and perjury inextricably linked to the bankruptcy fraud to which he had already pleaded guilty. Thus, having made it clear to D'Onofrio that the policy from which he would benefit applied to any defendant, to Pfingst as well as to D'Onofrio, Ryan could reasonably conclude that these assurances could not serve as a motivating influence prompting D'Onofrio's willingness to testify. Accordingly, we do not consider Judge Weinstein's finding of nondeliberateness to be clearly erroneous.

Nor do we believe that the existence of these assurances, especially in view of their neutral, policy oriented nature, represented evidence of such "high value" to Pfingst's trial preparation that Ryan could not help but recognize the necessity for disclosure. To be sure, as we noted in *Pfingst I*,[15] D'Onofrio's credibility was a critical issue at the bankruptcy fraud trial. But, unlike those cases in which the unrevealed evidence was crucial to an evaluation of credibility, *see e.g. Giglio* v. *United States*, 405 U.S. 150 (1972) (key government witness would not be

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15 We do not consider our broad language in *Pfingst I* [*United States* v. *Pfingst*, *supra*, 477 F.2d at 191] that "[f]ailure to reveal evidence of such an understanding would, of course, violate due process and require a new trial" to be determinative of the instant appeal for two reasons. First, as we have indicated, the undisclosed assurances were not the product of an "understanding," not in the nature of a benefit conferred on D'Onofrio in return for his testimony. Second, because we found no basis for the allegations of nondisclosure raised by appellant in *Pfingst I*, our conclusion about the effect of nondisclosure was not premised on the careful analysis of materiality required when nondisclosure is in fact revealed. *United States* v. *Mayersohn*, 452 F.2d 521, 526 (2d Cir. 1971).

indicted for any crime); *Napue* v. *Illinois*, 360 U.S. 264 (1959) (key prosecution witness promised a favorable sentencing recommendation), the undisclosed assurance in this case were of minimal if any value in view of the ammunition already available to assault D'Onofrio's credibility. In contrast to *Giglio* and *Napue*, the government had disclosed well prior to trial that D'Onofrio had been allowed to plead guilty to one count of the indictment and had been promised a favorable recommendation on sentencing. In fact, at Pfingst's request D'Onofrio was sentenced prior to the bankruptcy fraud trial and, because of his cooperation, received only a suspended sentence and a fine of $10,000—a sentence, which in the hands of defense counsel as able as Marcheso, could be telling on cross-examination.

In addition to these weapons, with which Marcheso could and did launch a powerful assault on D'Onofrio's credibility, he developed a line of attack which rested quite logically on D'Onofrio's nefarious course of conduct following the bankruptcy fraud escapade. As Marcheso described it in appellant's brief in *Pfingst I*, Brief for Appellant at 20, *United States* v. *Pfingst*, *supra*:

> [The defense mounted] an assault on the credibility of D'Onofrio by showing that D'Onofrio had admitted the commission of many crimes; had amassed a fortune in excess of $9 million subsequent to the bankruptcy without paying taxes on it; that D'Onofrio possessed numerous Swiss bank accounts which he refused to discuss; that he was currently engaged in stock manipulations which were the subject of an inquiry by the Securities and Exchange Commission; that he was not indicted for any of these crimes, some of which he admitted during the course of the trial [citations to transcript omitted]; that his testimony

against Pfingst was an invention when he shrewdly assessed that he could extricate himself from difficulties by "selling" to the Government the head of a Supreme Court Judge.

Moreover, it is unlikely in the extreme that Marcheso would have utilized the assurances relating to crimes arising out of the bankruptcy fraud because their repetition would only serve to emphasize the very scheme for which his client was on trial. And, it is equally doubtful that Marcheso could have plausibly argued that D'Onofrio was motivated to admit bankruptcy fraud by a desire to avoid prosecution for crimes which, but for his testimony, could not have been proven. Accordingly, we do not consider the undisclosed evidence to be of such "high value" that a new trial is required to remove the taint of prosecutorial impropriety.[16]

Although we find no evidence of bad faith on the part of the government, we recognize that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution." *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). In this case, Marcheso requested disclosure of any "promises or assurances made to defendant D'Onofrio which could reasonably give hope to defendant D'Onofrio for lenient treatment as a result of his

16 Appellant contends that the government's nondisclosure seriously impaired his preparation for trial by depriving him of important facts necessary to make the critical choice—which case to try first. Yet, in light of the overwhelming strength of the evidence already in defendant's possession with which to attack D'Onofrio's credibility, we cannot agree that knowledge of the two undisclosed assurances could reasonably have affected trial strategy. Rather, we believe, and appellant concedes, that it was the unforeseen ruling by the trial judge—refusing to restrict the scope of cross-examination should Pfingst choose to testify—a ruling that Pfingst strenuously though unsuccessfully attacked on direct appeal, that undermined his tactical choice.

testimony." While we conclude that the government in good faith interpreted this request as one calling for "assurances" given as a quid pro quo to induce D'Onofrio's testimony and, therefore, not applicable to the assurances at issue, we cannot characterize the government's failure to disclose these policy statements as entirely without fault. Nevertheless, the mere existence of undisclosed evidence, even following a request, does not alone compel a new trial under *Brady* for, as we said in *United States* v. *Keogh*, 391 F.2d 138, 147 (2d Cir. 1968),

> . . . while *Brady* eliminated the issue of good faith when a suitable request has been made, the Court retained the requirement of materiality, as had earlier decisions of ours, see United States v. Consolidated Laundries Corp., 291 F.2d 563, 570-571 (2 Cir. 1961); Kyle v. United States, 297 F.2d 507, 513-515 (2 Cir. 1961), without, however, being obliged by the facts to define with precision just what this meant.

The term "materiality" as used in *Brady* clearly describes evidence of greater value than that which is merely "favorable to the accused." *Giglio* v. *United States, supra*, 405 U.S. at 154. This distinction, moreover, comports with the rationale that where the prosecutor has at most been negligent in failing to comply with a request for discovery, prophylactic considerations must be tempered by an evaluation of the prejudice to the defendant from the nondisclosure. In striking this balance, where nondisclosure has been inadvertent rather than willful, we have formulated a standard of materiality which requires that there be "a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *United States* v. *Miller*,

411 F.2d 825, 832 (2d Cir. 1969); *United States* v. *Mayersohn, supra,* 452 F.2d at 526, *United States* v. *Kahn, supra,* 472 F.2d at 287.

After a careful consideration of the bankruptcy fraud trial record, we are convinced, as was the district court, that revelation of these undisclosed assurances could not have affected the verdict in this case. We have already described the blistering cross-examination to which D'Onofrio was subjected and the devastating revelations extracted to impeach his credibility. The result was that the jury convicted Pfingst only on those three counts for which the government presented independent documentary and testimonial evidence to buttress D'Onofrio's account. Moreover, unlike *Miller,* in which we felt constrained to order a new trial because "the defense could and very likely would have made [the undisclosed evidence] the capstone of its attack on the crucial witness for the prosecution," *United States* v. *Miller, supra,* 411 F.2d at 832, we cannot conceive, for reasons previously discussed, of a comparable use for the undisclosed assurances here.[17] Accordingly, we conclude that the government's inadvertent failure to disclose that assurances had been given

17 Pfingst argues that since a critical question at trial was whether D'Onofrio had perjured himself in his prior testimony during the bankruptcy proceedings or was committing perjury by falsely recanting that testimony at the trial, knowledge that D'Onofrio would not be prosecuted for admitting the prior perjury would have had an important bearing on the jury's resolution of this issue. Though the argument has superficial appeal, its weakness becomes apparent upon consideration of the enormous risk to Pfingst in raising this point to the jury. Emphasizing that D'Onofrio could reasonably expect not to be prosecuted for prior perjury would have had the inevitable tendency of reinforcing the existence of that prior perjury in the minds of the jury. This danger, moreover, was clearly recognized by Marcheso since, except for a brief allusion to the false poverty affidavit filed by D'Onofrio in 1969, he failed even to insinuate that D'Onofrio might not be indicted for the perjury he was then revealing, although he knew full well that D'Onofrio had not been indicted for perjury.

to D'Onofrio that he would not be prosecuted for perjury or tax evasion arising out of the bankruptcy fraud scheme did not so prejudice Pfingst as to require a new trial.

III.

Pfingst also contends that he was denied a fair trial because at one point the government solicited false testimony during the redirect examination of D'Onofrio and, on a second occasion, failed to correct a false response by D'Onofrio in the course of Marcheso's cross-examination. Appellant therefore urges us to order a new trial on the grounds that whether false evidence is deliberately solicited or allowed to go uncorrected when it appears, either course is "incompatible with rudimentary demands of justice." *Giglio* v. *United States, supra,* 405 U.S. at 153. *See also Napue* v. *Illinois, supra,* 360 U.S. at 269; *Mooney* v. *Holohan,* 294 U.S. 103, 112 (1935).

Upon examination of the record, however, we find no support for Pfingst's first allegation that the government elicited false testimony from D'Onofrio. The allegedly tainted portion of D'Onofrio's redirect examination occurred after Ryan had read to the jury the three letters, two of which were sent by the SEC and the third by the IRS, which indicated the status of agency investigations of D'Onofrio. After reading the letters, the following colloquy between Ryan and D'Onofrio took place:

> Q. All right, has anyone made any promises to you in connection with any one of those investigations?
>
> A. No.

Although Pfingst does not claim that any promises were made to D'Onofrio concerning the pending SEC investigations, he does argue that D'Onofrio was assured that he would not be prosecuted for income tax evasion for unre-

ported bankruptcy fraud income and that the IRS letter read to the jury referred to an investigation into tax evasion related to that source of unreported income. Yet, the letter in question seems clearly to indicate that the IRS investigation was not prompted by the bankruptcy fraud because the IRS was unaware of the bankruptcy matter until *after* it had begun its investigation. Thus, the letter states, in pertinent part:

> On May 26, 1971 the Intelligence Division of the Internal Revenue Service, Brooklyn District, initiated a preliminary investigation of possible criminal violations of the Internal Revenue Code by Ramon D'Onofrio. Early in the investigation, Special Agent Leo Libowitz, who is assigned to the case, discovered from the files of this office and from news reports that Mr. D'Onofrio was involved in a bankruptcy matter which is of current interest to your office. Because of this, and the press of other assignments, Special Agent Libowitz temporarily suspended his investigation.

Since the investigation referred to in the letter apparently stemmed from D'Onofrio's post-bankruptcy fraud activities, which included the failure to file tax returns for 1969 and 1970, and about which we have already concluded that no assurances were communicated to D'Onofrio, we do not find D'Onofrio's response to Ryan's question to be false.

Pfingst's second claim of allegedly false testimony by D'Onofrio rests on the following exchange between Marcheso and D'Onofrio, during D'Onofrio's cross-examination:

> Q. Mr. D'Onofrio, I believe you testified that you told—withdrawn.
>
> Did you tell the Government that Defendant's Exhibit K, the affidavit, was false?
>
> A. Yes, I did.

Q. Thank you.

Did they tell you that is violation of federal law?

A. They—I don't think they told me it was a violation.

Q. Did you know you could be indicted for that?

A. I know that making a false oath or false statement in front of the bankruptcy court and all the crimes that I committed in relation to this case were capable of being indicted for.

Q. Separate and apart from the bankruptcy transaction in 1965 and 1966, the filing of the false affidavit in 1969 put you in jeopardy of another indictment?

A. If you say so, Mr. Marcheso.

Q. You have never been indicted for this, have you?

A. No.

Q. The Government never indicated that they would indict you for this?

A. They never indicated that they would not.

Although we agree with Pfingst that D'Onofrio's final response was false in light of the assurances he had received concerning bankruptcy fraud related perjury, we do not believe, for reasons similar to those stated in Part II, that this isolated and immaterial instance of false testimony requires a new trial.

Ryan's failure to correct D'Onofrio's false statement could hardly be characterized as deliberate. During five days of cross-examination, the six questions quoted above represented the sum total of Marcheso's inquiry into possible perjury committed by D'Onofrio in the course of the bankruptcy fraud scheme. Thus, we consider Ryan's error in failing to correct the false testimony to be a product of inattention and not of deliberation.

A finding of negligence of course does not eliminate the injustice which will often arise when false testimony stands uncorrected. Nevertheless, in *Giglio* the Court reiterated that, in the absence of bad faith, "a finding of materiality of the evidence is required under *Brady*. . . ." *Giglio* v. *United States, supra,* 405 U.S. at 154. And, the Court added that "a new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . . .' *Napue, supra* at 271." *Id.* In contrast to both *Giglio* and *Napue,* in which prosecution witnesses falsely denied promises of leniency constituting the sole meaningful basis for attacking their credibility, D'Onofrio's false denial nullified no more than a cumulative source of an already demolishing impeachment. Thus, while the materiality threshold embodied in the "in any reasonable likelihood" standard may be low, it represents an insurmountable barrier in this case.

We have considered all[18] of appellant's claims and find them to be without merit. As on direct appeal, appellant's contentions have in many cases a "verisimilitude" but, after a careful and thorough analysis of the record, we believe that the interests of justice do not require a new trial. Accordingly, we affirm.

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18 In addition to the two points discussed in the text, Pfingst alleges that the government's failure to disclose D'Onofrio's exaggerated claims of immunity made to Brodsky between late July and early September, 1972, at the time that Pfingst's direct appeal was pending in this Court, amounted to deliberate misconduct, albeit on appeal, which warrants the prophylactic response of a new trial. Suffice to say that having concluded that the government acted in good faith when it failed to disclose the two assurances that were given to D'Onofrio on the ground that they were not considered to be the product of an "understanding," we decline to characterize a similar state of mind on direct appeal as tantamount to bad faith. Accordingly, since we have found that the nondisclosure did not in fact prejudice Pfingst at trial, we see no merit in this claim.

THE COURT: This is a very difficult case. My staff is on holiday so I will dictate this opinion from the bench rather than having it typed up.

At the end of my statement if either counsel wants to bring corrections or amendments to my attention, feel free to do so because normally I would have dictated this following this discussion to my secretary and corrected it in a number of drafts.

The case is difficult both factually and legally. Factually because it illustrates the enormous ambiguities in conduct and in motivation that we are faced with when we try to reconstruct what happened years ago under great emotional tension when so many people were involved that had different motives and different ends in view.

It illustrates the difference between what was formally said, what was intended to be understood by statements, and what was in fact understood.

We have to bear in mind here a variety of personalities whose statements and motives have a bearing on a determination of the facts.

We have Mr. D'Onofrio, who is a salesman, a very good salesman, a man of great arrogance, who sold a lot of milk and a lot of stocks -- and there are allegations that stocks are, to a large extent, fraudulent.

It is obvious that he thought himself in great trouble and he had enough arrogance to believe that he could manipulate the Government and everybody else to protect himself from the very outset of his relationship with Mr. Scuderi, as indicated by the very first memorandum of that conversation.

We have Professor Duke, who is a skilled lawyer, well-known professor, legally knowledgeable in the area of evidence, which he teaches, and constitutional law; very anxious to protect his own client; chagrined, I believe, by the fact that a man that he was supposed to represent has now gotten into more serious trouble than he suspected he would ever be in; and with a certain

amount of interest in showing his own skill and control during earlier stages.

We have on the part of the Government at this time a relatively new prosecutorial staff, most of them relatively inexperienced in prosecutorial work, many of them highly skilled, hard working, but without a long period of experience in dealing with these kinds of cases. That included the head of the Criminal Division, Lombardino, who himself had a great deal of experience, but not as a Federal Prosecutor. And even Mr. Neaher, who is a highly skilled attorney, but with little experience in criminal law, used to the kind of negotiation, I think, that you would have in civil cases among lawyers of equal stature, whose word could be fully relied on, and quite open and honest in his dealings with them.

You have Mr. Ryan, a very bright and aggressive, somewhat experienced prosecutor with, I think, based on his work here, a highly moral attitude, high ethical sense, who is outraged by what he considered to be the activities of a Supreme Court Judge who had failed to meet the trust placed in that high position.

You had Mr. Marcheso, a highly experienced *lawyer* who had full knowledge of how the Government in this district worked or should work, having served here as an assistant, carried heavy cases in private practice, worked with the F.B.I. and others and knew exactly what the system would normally be expected to turn up.

And you have Mr. Scuderi, a highly experienced and tenacious F.B.I. Agent, with a great reputation for morality and ability.

And there were a number of other presonalities involved like Mr. Scotti, Mr. Keeney and the like, but they were merely subsidiary.

It was obvious that D'Onofrio in his first meeting with the F.B.I. was seeking full protection for crimes, and primarily those crimes in the post-bankruptcy era, because the milk business and the bankruptcy were matters of past history, as far as he was concerned.

He was then a man who had achieved substantial wealth and power in the securities and international banking -- using the word "banking" in an extravagant sense -- *fields.*

He was interested in protecting that large fortune that he was in the process of acquiring from serious attacks by the SEC and others that would have stripped him of this power that he had acquired.

The F.B.I. at the first opportunity told him formally, and I believe Mr. Scuderi meant it, and I believe Mr. D'Onofrio knew that Mr. Scuderi meant it, there were no promises; if he gave information and did anything, the F.B.I. would guarantee him no immunity and no protection, except his physical protection. I don't believe D'Onofrio was at all concerned with that, given his arrogance.

He immediately began to woo Mr. Scuderi, and it was obvious that he had consistently, during the period of these preliminaries and the trials effectively carried on that activity.

So far as Mr. Lombardino was concerned, in their first interview with D'Onofrio and Duke, *they* were told that they would permit a plea in the bankruptcy case and bring cooperation to the Court's attention, and that nothing else was promised.

At that time we have to bear in mind that the bribery case was not a realistic prosecution, although there were the possibilities of other cases in the offing.

I believe that Mr. Ryan told Mr. D'Onofrio and Mr. Duke on July 1, 1971 that D'Onofrio would be permitted to plead to one count, that the other counts would be dismissed against him and that his cooperation would be brought to the attention of the Court, but that no other promises were being made.

Ryan was obviously very much annoyed by the attempts of Duke at this critical July 1st meeting to vary the formal promises by referring to tax immunity. I credit his statement that he called Duke and told Duke to straighten his client out, that the formal promise just referred to was the only promise being made.

This is what was told to the Court, this was the formal promise. So much for the formal record, which is quite clear in this case. We now come to the informal statements of the prosecutors, which D'Onofrio and Duke paid very careful attention to.

THE COURT: Mr. Lombardino and Mr. Neaher, now Judge Neaher, informed Mr. Duke that they understood the policy of the Eastern District to be that a Government witness would not be prosecuted criminally for tax problems revealed as a result of truthful testimony given in a case such as the bankruptcy case that was in the offing. Based on that conversation D'Onofrio and Duke could reasonably believe that it was highly unlikely that any income D'Onofrio received in the bankruptcy operations would result in a criminal prosecution, but that civil penalties would have to be paid, and any income derived from that bankruptcy fraud would have to be taxed.

Mr. Ryan in effect so far as they were concerned, although this was not his intention, confirmed their understanding when he made it clear to them that the IRS could prosecute independently, because I think they reasonably took that to mean a confirmation of what Mr. Neaher and Mr. Lombardino had said, that this district would not to the extent that it controlled the case prosecute criminally for tax liability arising from the bankruptcy matter.

No one in any way gave D'Onofrio any assurance, explicit or implied, about any tax prosecution for his nonbankruptcy income arising out of any of the security transactions or anything else.

The only "assurances," and that word should be in quotes because it was indirectly implied, related to income arising from the bankruptcy fraud, and as I recall, the 1965-1966 income tax period.

I believe that Mr. Lombardino and Mr. Neaher suggested to Mr. Duke that it was the policy of the Eastern District not to prosecute for perjury on a prior occasion which was revealed in

testimony of a Government cooperating witness, and therefore it was highly unlikely that any lies told by the defendant, D'Onofrio, during the bankruptcy proceedings, which would normally be prosecuted in this court, that is, in the Federal Court, would be prosecuted by the United States Attorney.

I do not believe that any assurances, direct or implied, were given with respect to possible perjury prosecutions in the State Court in connection with the agricultural marketing proceedings.

I do not believe that Mr. Ryan said anything to D'Onofrio or Duke with respect to this policy.

I take it that being a senior prosecutor in the office he was aware of what his immediate chief and head of the office was saying. And when D'Onofrio at Page 2167 and 2168 of the bankruptcy trial records said that they never said they wouldn't prosecute, he was saying something that was literally true. The Government had never so stated.

But I believe that based on the statement of the various Government attorneys he and his attorney felt reasonably assured that they wouldn't be prosecuted by the Federal Government for perjury in connection with the bankruptcy matter.

I do not believe that any assurances direct or indirect were given with respect to the perjury before the Securities and Exchange Commission with respect to the A.K. matter or with respect to any other matter by anybody in the Government.

I do not believe that the Government agreed or gave D'Onofrio any reason to believe, based upon their conduct, that D'Onofrio would receive immunity for any of his post-bankruptcy activities.

Now, there is an additional factor here. Mr Ryan believed it unfair to use a Governement witness' own testimony to make a case against that Government witness. This was not a policy of the office so far as I can tell, although it may possibly be. And he himself had apparently decided not to turn over his copy of the

transcript of the trial to the Southern District in order to permit the Southern District to proceed more expeditiously. Whether this feeling of his was brought to the attention of D'Onofrio or Duke is not clear, but I believe on the record, and I so find, that this feeling of Ryan was not brought to their attention prior to or during the bankruptcy trial. Nevertheless I believe that D'Onofrio had a feeling that this was going to be the result because, as in the case of Mr. Scuderi, he was obviously actively wooing Mr. Ryan. And I believe that by the bribery trial D'Onofrio came to the conclusion that he could expect some support from Mr. Ryan in this or other ways in connection with possible prosecution. I do not believe, however, he came to that conclusion during or before the bankruptcy trial.

In any event I do not consider this to be a critical matter since both Duke and D'Onofrio both realized that the transcript could be obtained elsewhere; that their nemesis, Mr. Marcheso, would supply it if no one else did.

Ryan did not mislead the defendant as to what he believed the arrangement would be.

I reject the claim that Ryan deliberately misled anyone. I just don't believe it.

No one in the Government suggested to D'Onofrio or Duke any other benefits that would arise from his testimony other than those I have already noted.

There was no assurance that D'Onofrio would not be prosecuted criminally for security frauds, revealed or unrevealed, or for tax matters, revealed or unrevealed, arising from activities here or abroad or from any failure to file.

The only reasonable expectations that Duke could have, based upon what was said and done by the Government was with respect to the tax and bribery matter arising from the bankruptcy proceedings.

Now we get to a third level in this aspect, and that is what was believed by Duke and D'Onofrio. That is a very difficult thing to determine because their beliefs varied as time went on. It is very

hard to untangle what they now believe and what they believed at the critical period before the bankruptcy trial.

Mr. Duke's present recollection of promises of informal immunity I do not credit. He is obviously a highly skilled lawyer anxious to protect his client, and as I indicated, disappointed by the present difficulty his client faces partly because he opened the door to information in the Eastern District Prosecution.

Mr. Duke's and Mr. D'Onofrio's statements to the Southern District Prosecutors after the event must be viewed in the light of the serious efforts D'Onofrio was then making in the way of claims, or at least the extravagant claims of what the Eastern District promised in order to prevent prosecution in the Southern District.

There was a deliberate attempt by D'Onofrio to play the Eastern District off against the Southern District.

Duke made arguments to the Southern District that his client had been promised informal immunity. But except as I have already noted, these were his legal contentions and not what in fact was offered as an inducement to D'Onofrio. Because of his position as a teacher and a respected member of the bar I believe that Duke was given more respectful attention by the young assistants Trager and Ryan than he otherwise would have received for those contentions which I consider baseless, and this possibly may have misled him into thinking they accepted his viewpoint. But Mr. Trager, now also a professor, is well known here as a tough legal realist, and I simply can't believe that he or Mr. Ryan, relying on Trager, were taken in.

Duke's reported statements to Brodsky as to what was promised is not credible and is rejected by me as a statement of what any arrangement was at the time of the bankruptcy trial or before.

Now, D'Onofrio's own beliefs were also extravagant. They were based on his obvious attempt to gain the friendship and affection of the F.B.I. staff and the prosecutorial staff at the outset. I believe that his state of mind was that if Ryan and

Scuderi became beholden to him they would do what they could to protect him, and that they would protect him.

This attitude was patent at the trial. The self-assurance of D'Onofrio and his arrogant answers to questions put to him on cross-examination could only have given the jury the impression that he thought he would get away with everything as the result of his cooperation.

Mr. Marcheso's masterful and lengthy cross-examination revealed this witness' character, hopes and beliefs with absolute clarity.

The language in the record alone reveals this, but the demeanor and drama of the courtroom interplay made that completely clear.

The result of the cross-examination was that D'Onofrio, so far as any observer could tell expected to be let off free, and that he was testifying as a Government witness to save his skin and to prevent any possible prosecution.

The charge of the Court emphasized the great danger of reliance upon a witness such as this who is trying to save his skin by testifying.

We now come to the issue of whether a new trial should be granted on this state of facts.

The motion is made under Rule 33 of the Federal Rules of Criminal Procedure which provides that the Court on motion of the defendant may grant a new trial if required in the interest of justice.

A motion for a new trial based on the ground of newly-discovered evidence may be made only before or within two years after final judgment. But if an appeal is pending the Court may grant the motion only on remand of the case.

A motion for a new trial based on any other grounds shall be made within seven days after verdict or finding of guilt or within such further time as the Court may fix during the seven-day period.

In a technical sense none of the evidence except the claims of D'Onofrio and Duke to Mr. Brodsky is new. And this evidence is, as I have already noted, not credited by the Court.

The motion made before Judge Bartels by the defendant for hearing on the plea of D'Onofrio shows the defendant's belief, that is the defendant Pfingst's belief, that a deal had been made. The decision of Judge Bartels to deny an inquiry at that time was a procedural one based upon the timing of the motion. It did not preclude a raising of the issue at trial by bringing in other witnesses to challenge D'Onofrio's credibility. And it should be noted that a witness from the Southern District Prosecutor's Office, Mr. Morvillo, was brought over on the point by the Government. And his testimony was rejected on the basis of the Defendant Pfingst's objection. As I recall, I gave the defendant great latitude in this respect, even opening up --

MR. MARCHESO: Excuse me, your Honor, I do not mean to interrupt --

THE COURT: -- the pre-sentence report of D'Onofrio since I considered D'Onofrio's credibility critical and was willing to permit the defendant to go into collateral matters by extrinsic proof on this issue.

The witnesses heard on the hearing which has taken place over the last seven days were available at the trial.

Now reading Rule 33 literally therefore the motion is not timely.

But this technical ground that no "newly-discovered evidence . . ." is involved does not seem to me to end the matter. As a practical tactical matter calling as defense witnesses Lombardino, Judge Neaher, Scuderi, Keeney, Ryan and Duke would have been most dangerous. Not until D'Onofrio became a fugitive and tensions among the Eastern District and Southern District prosecutors and D'Onofrio and Mr. Duke led to Mr. Duke's and Mr. D'Onofrio's charges, was the matter ripe for full and open investigation.

So I reject as a ground for decision therefore the lack of timeliness.

I have, however, and do recommend that in order that there be no question about this that a separate proceeding be brought under Section 2255 of Title 28 which provides in part: ". . . that a prisoner in custody under sentence of the Court claiming of a right to be released upon the ground that the sentence was imposed in violation of the Constitution, or the Court was without jurisdiction or is otherwise subject to collateral attack may move the Court which imposed the sentence to vacate, set aside, or correct the sentence, and a motion for such relief may be made at any time by a separate action . . ."

The demand for relief here would be of course to vacate rather than to correct. And if such a proceeding is brought at the earliest possible moment, today, tomorrow, or Monday, this decision will be deemed to be a separate decision as well as a motion --

MR. MARCHESO: We will initiate the proceeding today.

THE COURT: We thus are brought, at least under one view of the law, to the critical issue and that is would any of this information developed at this hearing have affected the verdict? I am convinced beyond a reasonable doubt that it wouldn't have had the slightest effect on the verdict. In fact, it would have paradoxically, strengthened the jury's belief in D'Onofrio. As the cross-examination left him the jury could, based on his answers and demeanor, and the facts elicited, only believe that he expected to go unwhipped of justice as a result of his cooperation with the Government.

The testimony and documents show and subsequent events prove beyond doubt that he was always in serious jeopardy of prosecution except for the tax prosecution which possibly might arise from the bankruptcy fraud and the perjury arising from the bankruptcy fraud.

None of what has been revealed at this hearing or at the two trials would have made any difference in my own sentencing of

D'Onofrio. I do not feel that I was misled in the slightest, nor do I feel that the pre-sentence report was tailored in order to mislead me. The information that was in it was typical of the kind of information that comes in those pre-sentence reports, and I had little doubt that D'Onofrio, based upon my observations of him and what I had already seen in the record, was a man who presented substantial dangers to the community and was likely to be operating illegally in the future. And I had no doubt when I sentenced him that there was a high probability that he would appear before me again in connection with a violation of probation and that he would be sent to jail. The first sentence that he had gotten was four months and should he act illegally in the future during the probation period he will receive an even longer jail term. He was a first offender as far as the Court was concerned and with an excellent record as a Marine, as I recall, and other factors in his favor, and in view of his cooperation his sentence was entirely consistent with the sentence of such men before this Court.

The mills of justice have been grinding very slowly in this case but they have ground exceedingly fine so far as D'Onofrio was concerned. As a result of his admissions and his misdeeds he is a convicted felon. His reputation and career are destroyed. His fortune is gone or will be gone. And he faces further embarrassing and potential dangerous criminal and civil proceedings.

The law has not been and will not be lenient with him. I had clearly in mind the fact that he is presently on probation and can be sentenced to a further term.

Now of course from the point of view of the defendant Pfingst, he is much in the same position. There is perhaps an even greater tragedy involved here because the defendant Pfingst with a high position, fine family, and secure reputation in the community fell further than D'Onofrio. He, too, was denominated a felon, stripped by the expenses of this litigation of his fortune, and he faces further proceedings that may result in the loss of his professional standing.

This is a tragedy that all convicted defendants and their families face.

The Court's sympathy and understanding of all defendants before it provide no warrant for ignoring the law. And I am convinced that this defendant had a trial as fair as it is possible to make one in this imperfect world. He received his full measure of due process. Nothing I have heard or seen here convinces me that the jury was wrong. And it is not my function to decide whether the defendant is guilty or innocent, and I make no such determination. If the jury erred and convicted an innocent man, as is always possible, it is a matter of regret but nothing that this Court can correct.

Now, that brings us to the end of the discussion of the motion for a new trial.

I still have the problem of the separate action under 2255. And the theory here would be, I take it, that even though the individual prosecutor operated in good faith and revealed to the Court and jury everything that he believed was relevant and bore on the testimony, if the defendant had in his mind a subjective impression with respect to possible immunity based on what others had said in the office of the prosecutor or what his attorney had said to him based upon what others in the office of the prosecutor had said, then a new trial would be required.

Now, that concept -- that even though the prosecutor trying the case, the Assistant trying the case, did not mislead the jury, and even though the Court is convinced that had the jury known what was in the defendant's mind, and had it resulted from statements made by somebody in the prosecutor's office, it would not have affected the verdict -- may well require a new trial on the theory that the defendant was entitled to know and entitled to bring to the jury's attention what is in the defendant's mind so far as what is in his mind depends upon statements of anybody that he dealt with. And the theory, I suppose, would be that the Government is required to keep adequate detailed records of its dealings with the defendant and with witnesses utilizing record keeping in a way that would permit giving this information to the

defendant and his counsel. I don't believe that that is the law. I believe that the Government in the Eastern District should seriously revamp its procedures, as I already suggested to Mr. Morse, so that statements that are made to defendants and their counsel in this connection will be made matters of record so you don't have the slightest possibility of misleading. But I do not think as a constitutional matter under 2255 a new trial would have to be granted for failure to keep such records even though, as I say, it is desirable. I think there is a line between prosecutorial discretion, sound practice, and a constitutional requirement that I must draw in applying 2255.

Now that leaves us with the further question of whether Mr. Ryan knowing what the policy was with respect to taxes in the bankruptcy and perjury in the bankruptcy, had an obligation to bring that policy to the attention of Mr. Marcheso. It is an arguable point even though, as I say, it does not affect the verdict at all.

But in the context of this case I simply don't see it as a sufficiently tenable ground for a reversal.

In another case, where the focus of a promise implied from policy was critical to the witness' testimony, I think it could be grounds for reversal. But the critical question here with respect to Mr. D'Onofrio's desire to testify did not relate to the bankruptcy tax fraud or to the bankruptcy perjury, but to the post-bankruptcy proceeding.

I think, myself, that there was an error here, but under the cases I don't think it is sufficient to warrant a reversal.

That is, I think that the statements of policy made by Neaher and Lombardino which I've already discussed should have been stated on the record to Mr. Marcheso and to the Court.

I believe that probably Mr. Marcheso was aware of that policy but I think it is unwise, and I do not put my decision on that ground because I think it would be very unfair, and bad constitutional law, to give a defendant less protection because he has a more experienced lawyer, so I am assuming for the

purposes of this decision that Mr. Marcheso was not aware of those two policies -- that is the perjury and tax fraud prosecutions arising out of the bankruptcy matter.

The motion under 2255 is therefore also denied. A stay of surrender will be granted pending completion of appellate process, should the defendant wish to proceed with an appeal.

CONSTITUTION OF UNITED STATES

AMENDMENT [V.]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI.]

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for this defense.

RULES OF CRIMINAL PROCEDURE

Rule 33. New Trial

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the

court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

STATUTE — TITLE 28

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence

him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.